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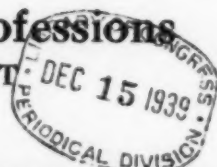
AMERICAN BAR ASSOCIATION  
JOURNAL

DECEMBER  
1939

VOL. XXV  
No. 12

Public Opinion and the Professions

By ARTHUR T. VANDERBILT



Dean Roscoe Pound on Property and  
Recent Juristic Thought

Words and Institutions — Origin of  
Some Procedural Terms

BY ROBERT W. MILLAR

A Confession of Faith BY WALTER P. ARMSTRONG

Justice and Civil Liberties BY O. JOHN ROGGE

Another Ross Essay — Court Review of  
Administrative Decisions

BY JOHN L. SEYMOUR

New Chapters of Max Radin's "Achievements  
of the Association"

State Bar News .... City Bar News .... Legal Institutes

Review of Recent Supreme Court Decisions

Legal Ethics .... London Letter .... Book Reviews

Decisions on Federal Rules .... Washington Letter

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## When the feller that needs a friend is a lawyer

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# AMERICAN BAR ASSOCIATION JOURNAL

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## CURRENT EVENTS

### *An Organized Bar Needed More Than Ever*      *Boston Bar Plans Lectures on New Federal Rules*

ADDRESSING the monthly meeting of the Los Angeles Bar Association on November 16, Charles A. Beardsley of Oakland, California, president of the American Bar Association, emphasized the pressing present-day need for such service as can best be rendered by the organized American legal profession.

He quoted from an early decision by the California Supreme Court a declaration that "a drunken man is much more in need of a safe street than is a sober man." And he declared: "Just as a drunken man is more in need of a safe street than is a sober man, so the American people today are in greater need, than at any other time in the last 150 years, of the services of an enlightened, diligent, fearless, and effectively organized, American legal profession."

"History tells us that Nero fiddled while Rome burned. If, in some future age, the history is written of the United States of America, during the first half of the 20th Century, will it be there recorded that, in the hour of their country's greatest need, those American citizens who were the best able to meet that need, fiddled or went fishing?"

Mr. Beardsley called upon American lawyers and judges to give more generous support to their state and local bar associations, and to the American Bar Association. He declared that "the profession as a whole is singularly backwards in its support of the organized American legal profession. The majority do little or nothing toward carrying the load. Many of this majority applaud the few who are doing the job that is the job of the entire legal profession. But many of them merely criticize the way someone else is carrying the load—like the people who stand outside the fence, shouting directions to the man who is fighting the bear."

Mr. Beardsley suggested that "the American Bar Association could the better discharge its responsibilities, if some more California lawyers and judges would come inside the fence, and lend a hand at fighting the bear."

HAVING received a citation at the San Francisco meeting of the American Bar Association "for conducting the best organized law institutes in post law education given in any large city," the Boston Bar Association is continuing its work along this line with a course of six lectures on the new rules of civil procedure for the district courts of the United States to be given in a federal court room on successive Mondays, beginning Nov. 13 and ending Dec. 18.

The course, like previous courses sponsored by the Association, will be open to all lawyers, whether members of the Boston Bar Association or not.

The lectures will be delivered by Alexander Holtzoff, special assistant to the attorney general of the United States. On behalf of the department of justice, he collaborated with the Supreme Court advisory committee which framed the federal rules of civil procedure. Since the new rules have come into effect, he has followed reported and unreported decisions on the rules and has had charge of editing bulletins of the decisions issued by the department of justice for the use of members of the department.

### *Dean Bates of Michigan Retires*

VOL. 38 of the *Michigan Law Review* is dedicated to Henry Moore Bates upon the occasion of his retirement as Dean of the University of Michigan Law School. The first number of the volume (for November, 1939) has a foreword by Hon. Harlan F. Stone, Associate Justice of the Supreme Court of the United States, in which he says, among other things:

"The retirement of Dean Bates during the present year has brought to a close his active service of thirty-six years as a law teacher, and twenty-nine as Dean of the University of Michigan Law School.

"Dean Bates began his university career at a time when the Law School,

like those of other leading American universities, was in the historic stage of transition from the performance of its traditional function as a vocational training school to that of the more intensive investigation and study of the law as a branch of the social sciences, by methods and with objectives which were to make a more appropriate subject of university study. . .

"To this great undertaking Dean Bates has brought the resources of an engaging personality, scholarly training, exceptional gifts as a teacher, and a true vision of the needs and future progress of university law school training. Under his guidance for more than a quarter of a century, the record of the Law School has been one of steady and consistent progress toward realization of an educational ideal, that training of the lawyer's facility in the technical skills of his profession must be tempered and guided by understanding of their social purpose and of the consequences to society of their misuse.

"Few careers afford greater opportunity for public service or more durable satisfactions than that of the law teacher. . .

"Dean Bates lays down his work at a time when it can be said that he has successfully carried forward the great task which lay before him when he became Dean. He leaves the School endowed with a wealth of material resources and generously housed in architectural forms of enduring beauty, beyond the fondest aspirations of those who envisaged its future a quarter of a century ago. More important, he leaves it with a spiritual and intellectual endowment which has enabled it to keep pace with the swift progress of legal education in this country, and which now affords the best assurance of its future usefulness."

### *Woman Jurors in Illinois*

IN 1930 the voters in Illinois, by referendum, approved a bill passed by the general assembly of the State, providing that women should be eligible for jury service. This bill was almost immediately declared unconstitutional

by the supreme court because of its provision for a referendum; not, however, before the coroner of Cook county had called five women to serve on a coroner's jury. Among those on this jury were a veteran member of the board of education, a vice-president of the Women's City Club and the president of the League of Women Voters. In spite of the forebodings of certain people none of these women fainted when they were called on to view the corpse. . . . Their judgment that the man suspected by the police should be released was vindicated two years later when two hoodlums confessed to the murder.

This was the first and last woman jury until the fall of 1939, after the legislature had again passed a bill providing for jury service. The women have been taken at their word, and hundreds of them have been called as jurors, in the State and in the federal courts, on both grand and petit juries. Most of those called have been taken from lists of names furnished by such organizations as the League of Women Voters and the Women's Bar Association, which had been requested to do so.

Their activities as jurors have been variously reported in the press, in either a critical or a semi-humorous manner. Some of the papers have featured stories such as little Johnny getting the measles in the midst of his mother's term as juror; of three women being arrested on the way to court for speeding because the nurse they had hired to take care of their children had been late; and of tea-parties which took the place of the supposedly customary poker-parties. In only one instance was there any serious criticism of a woman juror. This was when the wife of a member of the faculty of a distinguished institution of learning caused a mistrial by disavowing her vote when the jury was polled on the opening and reading of a sealed verdict. This was attributed by the press to woman's historic privilege of changing her mind at the last minute. Strangely enough, this has also been the historic right of men jurors.

It is too early to appraise accurately the value of women on juries in Illinois, because their term of service has been too short, and because most of those serving have represented a level of education and intelligence above the average. However certain facts have become evident and may be worth commenting on. One of the most interesting is that both judges and lawyers have shown confidence in the women's ability and have not only accepted them but in certain instances have insisted on putting them on cases of great importance. It is also interesting that,

contrary to general expectation, the women have taken their responsibilities very seriously and have filled to overflowing the "jury schools" which have been held in Chicago by the League of Women Voters, aided by members of the Chicago Bar Association. It has become apparent that there are more women than men who are able and willing to adjust their time and responsibilities so as to enable them to serve. Very few have asked to be excused and it is now a common sight to see juries made up entirely of women serving in both civil and criminal cases, while men of similar station seek to be excused from service.

L. T. S.

### **Appearance Before Single Industrial Commissioner Held to Be Practice of Law**

THE supreme court of South Carolina, in *State ex rel. A. G. et al. v. Wells*, Oct. 20, 1939, held as above, and ordered the respondent to cease from so acting. As a claim-adjuster employed by an insurance company he appeared before individual commissioners, filed pleadings, stated grounds, examined and cross-examined witnesses, and made arguments. The court quoted from or referred to *In re Duncan*, 83 S. C. 186, 65 S. E. 210; *Shortz v. Farrell*, 327 Pa. 81, 193 Atl. 20; *People ex rel. Chicago Bar Association v. Goodman*, 366 Ill. 346, 8 N. E. (2d) 941; *Goodman v. Beall*, 130 Ohio St. 427, 200 N. E. 470; and *Eagle Indemnity Co. v. Commission*, 18 P. (2d) 341 (Cal.). The South Carolina court said in part:

"There is no statutory provision in South Carolina defining what constitutes the practice of law. The term has been defined, however, by this court. . . . [In *People v. Goodman*] the court said: 'It is immaterial whether the acts which constitute the practice of law are done in an office, before a court, or before an administrative body. The character of the act done; and not the place where it is committed, is the factor which is decisive. . . .' Respondent apparently approves the rule of the Commission that only licensed attorneys should appear before the full Commission. If appearing before the full Commission requires legal skill, such requirement would apply with equal force to a hearing before the individual commissioner. Knowledge of legal principles is just as essential in the one as the other.

"We are not unmindful that the Commission is frequently denominated an administrative tribunal. But it is the character of the services rendered, and not the denomination of the trib-

unal before whom such services are rendered, which controls in determining whether such services constitute the practice of law. . . .

"Our attention is called to the fact that there has been an enormous development in recent years of administrative boards and commissions of various kinds among the States as well as the Federal Government, and that persons not licensed to practice law are permitted to practice before a great number of these boards or commissions. Many of these boards and commissions are legislative or executive in character, rather than judicial. To what extent lay representation should be permitted before such tribunals is not relevant to the present inquiry. . . .

"Petitioners contend that the determination of what does and does not constitute the practice of law lies solely within the power of the judicial and not of the legislative branch of the government, and cite various authorities which appear to sustain this contention. Respondent cites other authorities which appear to hold to the contrary. We find it unnecessary in this case to determine whether the legislature has the power to permit laymen to practice law, or whether the grant of that right is exclusively a judicial function. . . .

"In conclusion, it is not amiss to observe that the policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law. We may add that a dual trust is imposed on attorneys at law: they must act with all good fidelity to the courts and to their clients. They are bound by canons of ethics which have been the growth of long experience and which are enforced by the courts.

"The only work of respondent complained of in the petition is his appearance at hearings before the individual commissioners and practicing before them in contested hearings. Respondent states in his argument that in addition to this work he 'investigates the circumstances surrounding the injury which gives rise to the claim, makes a report to the home office, fills out forms as required and prepared by the Commission, files them with the Commission, notifies the Commission if the Company has decided that the claim is not compensable and is to be denied.' We do not think that the quoted acts would constitute the practice of law. . . ."

### **Labor and the Antitrust Laws**

A NOTABLE clarification of the anti-trust laws as applied to practices and tendencies of some labor unions was contained in a recent letter, written by Assistant Attorney General Thurman Arnold to the Secretary of

the Central Labor Union of Indianapolis, wherein he said:

"I reply to your letter inquiring about the application of the antitrust laws to labor unions. I make this reply public because numerous other inquiries similar to yours indicate widespread public interest in the question.

*Antitrust Laws Not an Instrument to Decide Labor Disputes*

"The antitrust laws should not be used as an instrument to police strikes or adjudicate labor controversies. The right of collective bargaining by labor unions is recognized by the antitrust laws to be a reasonable exercise of collective power. Therefore, we wish to make it clear that it is only such boycotts, strikes or coercion by labor unions as have no reasonable connection with wages, hours, health, safety, the speed-up system, or the establishment and maintenance of the right of collective bargaining which will be prosecuted.

*The Building Industry and Unnecessary Labor*

"The kind of activity which will be prosecuted may be illustrated by a practice frequently found in the building industry. Suppose a labor union, acting in combination with other unions who dominate building construction in a city, succeeds by threats of strikes or boycotts in preventing the use of economical and standardized building material in order to compel persons in need of low-cost housing to hire unnecessary labor.

"Here is a situation with no reasonable connection with wages, hours, health, safety, or the right of collective bargaining. The union may not act as a private police force to perpetuate unnecessarily costly and uneconomic practices in the housing industry. Progressive unions have frequently denounced this 'make work' system as not to the long run advantage of labor. Such unions have found it possible to protect the interests of labor in the maintenance of wages and employment during periods of technological progress without attempting to stop that progress.

"Preventing improved methods of production—as distinguished from pro-

tecting labor from abuses connected with their introduction—is, of course, not the only labor activity which goes beyond any legitimate labor purpose. We cite the example to emphasize the fact that union practices may become illegal where they have no reasonable connection with such legitimate objectives. . . .

"We have no choice in this matter. Such practices go beyond even the dissenting opinions of the Supreme Court of the United States, which recognize a broader scope for the legitimate activities of labor unions than the majority opinions. In our anxiety to be fair to labor we are not subjecting to criminal prosecution practices which can be justified even under the dissenting opinions of the United States Supreme Court.

"In the present building investigation a large number of legitimate activities of labor unions have been brought to our attention by complaint. We have been asked to proceed against unions because they maintain high rates of wages, because they strike to increase wages, and because they attempt to establish the closed shop. We have consistently disregarded all such requests.

*Secondary Boycotts—Conflict of Judicial Opinion*

"Refusals by unions to work upon goods made in non-union shops have also been brought repeatedly to our attention. In the past courts have held that such secondary boycotts are violations of the antitrust laws. In the *Duplex* and *Bedford Cut Stone* cases a minority of the Supreme Court presented the argument against this view. In view of this unsettled conflict of opinion among judges of the highest Court as to the reasonableness of such activities we have instructed the attorneys in the building investigation not to institute criminal prosecutions in such cases.

"The types of unreasonable restraint against which we have recently proceeded or are now proceeding illustrate concretely the practices which in our opinion are unquestionable violations of the Sherman Act, supported by no responsible judicial authority whatever.

*Practices Which the Antitrust Division Calls Wrong*

"1. Unreasonable restraints designed to prevent the use of cheaper material, improved equipment, or more efficient methods. An example is the effort to prevent the installation of factory-glazed windows or factory-painted kitchen cabinets.

"2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor. An example is the requirement that on each truck entering a city there be a member of the local teamsters' union in addition to the driver who is already on the truck. Such unreasonable restraints must be distinguished from reasonable requirements that a minimum amount of labor be hired in the interests of safety and health or of avoidance of undue speeding of the work.

"3. Unreasonable restraints designed to enforce systems of graft and extortion. When a racketeer, masquerading as a labor leader, interferes with the commerce of those who will not pay him to leave them alone, the practice is obviously unlawful.

"4. Unreasonable restraints designed to enforce illegally fixed prices. An example of this activity is found in the Chicago milk case where a labor union is charged with combining with distributors and producers to prevent milk being brought into Chicago by persons who refuse to maintain illegal and fixed prices.

"5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining. Jurisdictional strikes have been condemned by the A. F. of L. itself. Their purpose is to make war on another union by attacking employers who deal with that union. There is no way the victim of such an attack may avoid it except by exposing himself to the same attack by the other union. Restraints of trade for such a purpose are unreasonable whether undertaken by a union or by an employer restraining trade or by a combination of an employer and a union, because they represent an effort to de-

## MID-WINTER MEETING OF THE HOUSE OF DELEGATES

**I**N PURSUANCE of the resolution of the House of Delegates adopted at San Francisco on Wednesday, July 12, authorizing the Board of Governors to fix a time and place for a mid-winter meeting of the House, it is hereby announced that January 8 and 9, 1940, have been designated by the Board of Governors as the days upon which such meeting shall be held.

The sessions of the House will be held at the Edgewater Beach Hotel, Chicago, Illinois, beginning Monday, January 8, 1940, at 10:00 A. M. Central Standard Time.

HARRY S. KNIGHT, Secretary.

stroy the collective bargaining relationships of a union with an employer.

*Legal Rights Must Not Be Used in an Illegal Way*

"The principle applicable to unions is the same as that applicable to other groups specially protected by law. Investors may combine into a corporation, farmers into a cooperative, and labor into a union. The antitrust division has the duty to prevent the use of such legal rights of association in an illegal way for purposes far different from those contemplated in the statutes.

"Unions stand to gain by the vigorous performance of this duty. In the past most labor cases under the Sherman Act have arisen through private suits instituted without public responsibility and often conducted as a part of a struggle to destroy a union or to avoid dealing with it. Organized labor suffers when the selection of labor cases under the Sherman Act and the presentation of argument in such cases is left in the hands of those who may be hostile to organized labor itself. By contrast, enforcement of the law by officials with a public duty to be fair, consistent, and constructive involves an equal care to protect legitimate union activities and to prevent unlawful ones. In such enforcement, labor and the public will necessarily be informed as to the boundary between lawful and unlawful union action; and by virtue of such information the harassment of unions by unjust private suits will become more difficult."

***Dominion of Canada Vetoes Provincial Act Providing Very Short Period of Limitation on Enforcement of Debts***

THE Province of Alberta, Canada, passed an act providing that process should not issue on debts contracted before July 1, 1936, unless action should be started before July 1, 1940, or there should be a new agreement reviving the debt. Debts due from an individual to an individual, or from a corporation, were excepted. There were a number of minor provisions. This statute was disallowed by the Dominion government (technically "the Governor General in Council," practically the Premier and his cabinet) in March of this year, but was immediately repassed by the provincial legislature. It is now announced that the law has been disallowed a second time.

This Dominion power over provincial legislation presents some interesting

problems. A writer in the *Alberta Law Quarterly* for February, 1939, said:

"Some mention should be made of the policy and justification back of the power of disallowance. Why was it included in the 'supreme document'?"

"Sir John A. Macdonald made it clear both by his speeches before Confederation and by his practice later as Minister of Justice, that the veto power was to be a means of keeping the Provinces under control. Some of his successors in office opposed this policy and often refused to disallow on any grounds at all. Gradually however a certain constitutional practice has grown up though it cannot be described as certain. If the Act is clearly *intra vires* then it were best to leave it alone as the responsibility for the prejudicial effect of the Act, if such be its defect, will be on the Provincial legislature itself. If the Act is clearly *ultra vires* then it were best to leave it to the courts. These two rules are not to be too rigidly adhered to. It may happen that the Act, though clearly *ultra vires*, will, if left alone until the Courts can decide on it, have in the interim caused irreparable damage that should be avoided. In this connection the effect of the Bank Taxation Act, if it had not been disallowed, can be pondered. Again the question of minority rights must always be a tender one in Canada. Isolated provinces are sometimes prone to sudden fits of blind fury that may be injurious to the rest of Canada. Because of its national complexion and its greater sense of responsibility, the Dominion Government may be expected to better see the ultimate effects of such demonstrations. Disallowance may be the remedy most readily available to the Dominion in such cases. Most constitutions of a like nature to ours have found it necessary to provide for fixed safeguards for what can be best described as certain fundamental rights. There are none of these safety provisions in our constitution and so the power of disallowance, according to some at any rate, is considered as our closest approach to such safeguards. This power has been called by some the brake of our constitution. Whether it is to be used as an instrument of national policy or as an instrument of petty politics will of course be the responsibility of the Ottawa Government."

***Allegheny County Institutes***

THE Allegheny County Bar Association announces a series of institutes for the current year which began during the past month. The series is free to members, but a charge is made to non-members. The lectures are given Thursday evenings at 8:15 in

the Bar Association's rooms in the City-County Building. The program includes Pennsylvania corporation taxes and the Pennsylvania personal property tax, "Some Legal Problems from a Summer Vacation Trip," "The Lawyer and His Client," duties and powers of a trustee, the doctrine of promissory estoppel in contracts, and federal estate taxes—valuation of the gross estate. Harold Obernauer of Pittsburgh is president of the Association.

***Seminar on Wills***

THE first Seminar for Practicing Lawyers, which was held under the auspices of the Connecticut Bar Association at Waterbury on Nov. 8th, is called an unqualified success. The large courtroom was filled during the afternoon and evening sessions, and there were over 120 paid admissions. Lawyers of all ages were present from all parts of the State. Professor Leach of the Harvard Law School gave two fascinating lectures on various features of the law of wills, and there were intelligent questions and discussions. There was a dinner at the Waterbury Club, where Professor Leach was also the star performer with his accordion and topical songs.

The next Seminar is to be held in Hartford on January 8th with Judge Jennings as the principal speaker.

***Bar and Law School Institute Activities***

AS a prelude to the winter meeting of the Indiana State Bar Association, a legal institute on the subject "Drafting of Wills and Trusts: The Use of Powers of Appointment and the Avoidance of the Rule Against Perpetuities" will be given by Professor W. Barton Leach of the Harvard Law School on January 12, 1940. The institute will be held for three hours in the morning and three hours in the afternoon and will constitute a day of intensive study for the members of the Indiana Bar Association. The plan is the result of a most successful one-day institute on the National Labor Relations Act held in August at the time of the annual meeting of the Association.

***State Adaptation of Federal Rules***

Colorado

PHILIP S. VAN CISE, chairman of a Colorado Bar Association committee, told the Utah Bar Association at its summer meeting how Colorado courts and lawyers are planning to make their code of civil practice

(Continued on page 1072)

## Washington Institute Makes Unique Contribution in Administrative Law Field

FOR the second time a legal institute for practicing lawyers in Washington, D. C., under American Bar Association auspices, has made available valuable material in an important field of law. A year ago the subject was the new rules of Federal procedure and the fact that more than 5000 copies of the proceedings have been disposed of since that time shows the practical value of those sessions. During the week of November 13th last, over 500 lawyers attended the various sessions of the National Legal Institute on Practice and Procedure before Administrative Tribunals, where the practical workings of half a dozen important agencies were discussed.

Mr. George Maurice Morris, chairman of the managing committee, who presided at all sessions, continually stressed the fact that the Institute was devoted to the "how" and the "what" and not to the "why."

All the way through the Institute the first speaker in dealing with each subject gave a practical resumé of how business was conducted before it, while the second speaker approached his topic from the viewpoint of how the case was prepared, the importance of the record, and the practical considerations in presenting his case and taking an appeal.

An unusual and most attractive feature of the proceedings was the introduction of a three-man panel which was charged with asking questions of the two principal speakers. This technique produced a form of round-table discussion which was most interesting and which at times, as in the case of the discussion of the National Labor Relations Board, produced some interesting verbal jousting.

The opening remarks of the Institute were made by Chief Justice D. Lawrence Groner of the United States Court of Appeals for the District of Columbia, who referred to the fact that administrative tribunals had been vested with many judicial functions and that on their fairness and impartiality rested to an important degree the safety and welfare of the humble citizen as well as of the capitalist.

The principal speakers on the various subjects were:

National Labor Relations Board—Chairman J. Warren Madden and Thomas E. Kerwin of New York.  
Bureau of Internal Revenue—Chief Counsel John P. Wenchel and E.

Barrett Prettyman, former General Counsel.

Federal Communications Commission—Louis G. Caldwell, former General Counsel Federal Radio Commission, and Herbert M. Bingham, secretary Federal Communications Bar Association.

Federal Trade Commission—Chairman Robert E. Freer and J. Harry Covington of Washington.

The Relation of Interstate Commerce Commission Practice to Other Administrative Proceedings—Clarence A. Miller, General Counsel American Shortline Railroad Association.

What the Wage-and-Hour Law Holds for the Bar—Walter F. Dodd of Chicago.

Appeals of Administrative Agencies from the Viewpoint of the Courts—Justice Justin Miller of the United States Court of Appeals for the District of Columbia.

Fundamental Principles of Administrative Procedure—Dean Roscoe Pound, Director of the Institute.

Dean Pound, in the last address of the six sessions, developed to some extent the history and theory of administrative procedure and the present tendencies which are evident. In his discussion he said:

"How may we expect to bring about the kind of administrative hearings which experience indicates we must demand? Obviously we cannot exact any system of pleadings. But the system of notice pleading and pre-trial conferences developed in modern procedure

and the new Federal Rules suggests what may be done. We need to keep apart facts, law, and policy. Facts are for the administrative authority to determine, subject to requirements of due process both as to the mode of arriving at them and as to the basis of the determination on evidence of rational probative value. Law is ultimately for the courts. Policy is for the administrative authority, subject to statutory definitions and reasonableness as due process. Informal definition of the matters at issue, settled by the administrative authority in conference with counsel on both sides and made of record, would do more than save the time of the authority, counsel, and parties. It would confine the hearing to things really controverted. It would define what is to be found so as to distinguish facts from law and each from policy and so make a basis for clean-cut findings on which a reviewing tribunal could confine itself to its appropriate field. It would give full notice to the parties of what they must meet and what is likely to weigh against them unless explained or refuted. In these ways such a practice would go far to eliminate friction between administrative authorities and the courts. Different administrative agencies may have to develop such a practice of pre-hearing conference and definition of the scope of hearings differently to some extent to meet the exigencies of different types of subject matter. But the general idea seems applicable to all manner of quasi-judicial determinations."

## Washington Letter

### Justice Butler Dies

DEATH came to Associate Justice Pierce Butler, of the United States Supreme Court, at 4:14 a. m., Thursday, November 16, 1939, in a Washington, D. C., hospital, where he had returned after having been discharged earlier in the year. Although the seriousness of his condition was realized, the end was not expected at the time it occurred. He was generally understood to be in excellent health at the close of the past term of the Court, which ended in June of this year. Justice Butler's age was 73 years and 8 months.

Funeral services for Mr. Justice Butler in Washington were held at St. Matthew's Cathedral. There were in attendance the other Supreme Court Justices and other prominent officials. The American Bar Association was represented by a group of Washington attorneys designated by President

Charles A. Beardsley. Burial was at St. Paul, Minnesota.

Mr. Justice Butler was born in a log cabin on a farm near Northfield, Minnesota, March 17, 1866, St. Patrick's Day. His parents were Patrick and Mary Gaffney Butler, from County Wicklow, Ireland. In recent years, Justice Butler has been the only member of the Roman Catholic faith on the Supreme Court. He graduated from Carleton College in 1887; and, having read law in the office of a St. Paul attorney, was admitted to the bar there in 1888, where he practiced until he took office as an Associate Justice of the Supreme Court January 2, 1923. In the approximately 35 years of his active practice, Justice Butler handled much important railroad and public utility litigation, having acquired a reputation nationally, in 1907, with the Minnesota rate case. Although a Democrat, Pierce

(Continued on page 1071)

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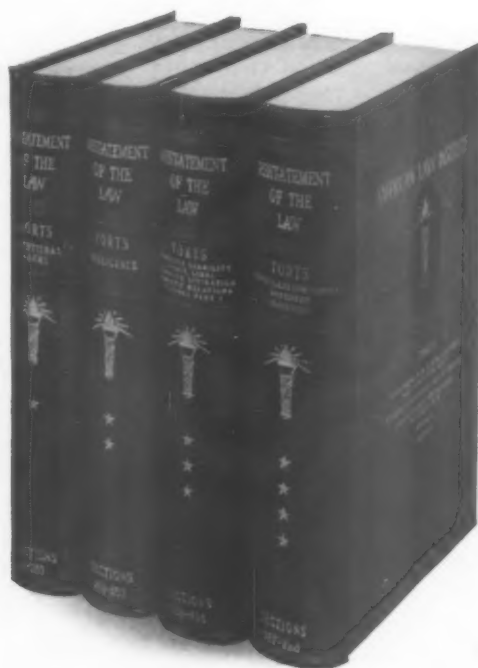
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# THE LAW OF PROPERTY AND RECENT JURISTIC THOUGHT\*

Fashions in Thinking as in Dress—Every Branch of Learning Was Once Called a "Philosophy," Then Everything was History, Reflecting Current Views of Evolution, Now All is Science—Analogies of Physical Science Have Led a School of Thinkers to Idealize Force—Private Rights: Liberty, Property—Absolutism—International Threats to Rights—Danger in "Administrative Discretion"—Loose Ideas of Public Policy—We May Have Both Justice and Security—Liberty, Property, and Law Are Products of Civilization and All Three Will Endure

By ROSCOE POUND

SOMETIMES juristic thinking has gone ahead of the law, leading it into new paths. More often it has run along with the law, organizing it or directing details in accord with current received ideals. Too often it has followed prevailing fashions of the thought of the moment, giving only a critique in terms of some such fashion. The philosopher of imitation tells us that man is an imitative animal: he imitates his forbears, that is custom; he imitates his neighbors, that is fashion; he imitates himself, that is habit.

There are fashions in thinking as there are fashions in dress, and the characteristics are much the same in each. In each, fashions will for a long time conform to a certain type, although with continual variation in detail. In each from time to time there come radical changes. In each there is likely to be little or no relation of what is the fashion of the time to the purposes of the thing governed by the fashion.

For a long time men wore robes and gowns such as today are worn only on formal occasions, academic, judicial, or sacerdotal. For a long time men wore what we call knickerbockers, now relegated to athletic costume. At one time men wore cocked hats, now, so far as I know, only surviving in the official dress of the head of a great secret society in one state.

## *Custom, Fashion, Habit*

In the same way when men wore robes and gowns thinking was governed by authority and held to forms prescribed by scholastic philosophy. When they were wearing knickerbockers and cocked hats, thinking was rationalist and assumed that all things could be solved by the unaided power of human reason. When, after the French Revolution, they began to wear long trousers and top hats, they thought metaphysically or historically on a metaphysical basis. Since the world war, as men have come to a free and easy dress, they have come to think skeptically or, as they put it, realistically. I am not urging a costume interpretation of history or of the history of thought. But in times of radical change the forces that make for change operate in all directions and affect outward dress no less than inward mental operations.

Again, fashions of dress have seldom borne much relation, and much less any necessary relation, to the purposes of dress, whether utilitarian or aesthetic. In the later Middle Ages a knight wore a surtout over his

armor and we read that one of the great English leaders of that time was killed because in the course of battle he tripped on his surtout. In the wars of the latter part of the eighteenth century we read that the head-dress of an infantry man was so heavy as to be a formidable hindrance to rapid movements. During the Napoleonic wars soldiers wore on the battlefield an enormous hat, so fashioned that in case of rain much water was accumulated on top. Then if while aiming the soldier bent his head to take careful aim, the water poured from the top of his hat, filled the priming pan, and prevented firing his piece. The first policemen wore top hats while on duty, and Lord Roberts, whose active military service lasted into the second decade of the present century, tells of the time when artillerymen wore leather breeches which were conducive to anything except mobility. One might make a parallel series of futilities in the history of thought.

Hegel has a chapter the title of which might be translated freely as "The Intellectual Menagerie" or (perhaps) "The Intellectual Zoo and Its Sham." The burden is that much academic thinking is shaped by the necessity under which the scholar finds himself of being original and productive and yet conforming his originality and productivity to the academic canon. He must conform to the fashion of thinking of the time. At all costs he must not be out of date. Yet if he looks for promotion or to stepping into the higher walks of the teaching profession, he must know how to nonconform brilliantly according to fashionable academic standards of nonconformity. From the nature of his calling he is tempted to indulge in a certain amount of fantastic thinking in order to attract attention. Hegel calls this the sham of the intellectual animals. In all consideration of human thought we have to distinguish modes of thinking which have grown out of the need of understanding particular problems of the time and place and have then been applied universally to persistent problems and so left their mark upon thinking for time to come, from mere intellectual fashions.

## *Philosophies, Histories, Sciences Have Followed One Upon Another*

In the era of reason every branch of learning called itself a philosophy. Descartes and Newton wrote on mathematical physics and astronomy under the name of natural philosophy. Linnaeus wrote a treatise on the elements of botany and called it botanical philosophy. Psychology was mental philosophy, ethics was moral

\*Address delivered at the annual dinner of the Section of Real Property, Probate and Trust Law at San Francisco, July 11, 1939.

philosophy. In the ninth edition of the *Encyclopaedia Britannica* a treatise on the principles of music is labeled "The Philosophy of Music." Spencer wrote on the principles of rhetoric under the name of "The Philosophy of Style." John Austin wrote a hard-boiled book on analytical jurisprudence, from which he eliminated everything in the way of philosophical method, and called it "The Philosophy of Law." During the reign of rationalist method everything claimed to be philosophy and used at least the vocabulary of philosophy even if it was purely empirical.

Then came the reign of metaphysical history and most of these philosophies became histories. The biological sciences, as we now call them, became natural history. History of philosophy came to stand for philosophy. Where there had been political philosophy there was history of politics. Where there had been philosophy of law there was historical jurisprudence. For a season where everything had been a philosophy it sought instead to be history. The idea back of history was taken to be evolution. Hence everything was to be looked at in terms of evolution.

Now we are in the era of science and all these philosophies and histories have become sciences. Natural philosophy and natural history are physical and biological science. Mental philosophy is the science of psychology. Ethics is a science of values. There is a science of historiography. Political philosophy and history of politics are now political science. Jurisprudence is the science of law. The divinity schools give degrees in theological science and the schools of business administration confer a degree in commercial science.

But while it is the fashion to call all these branches of learning by the name of science, as it had been the fashion to call them by the name of philosophy or of history, there has often been little corresponding change in substance or even in method. There has, however, been a serious effect upon thinking in the social sciences because many insist that the social sciences cannot be sciences since in their very nature they cannot conform to the methods of the physical sciences, wherefore they can be nothing more than superstitions. The result is an ultra-skepticism in politics and jurisprudence which is playing into the hands of absolutism all over the world. In the physical sciences we have to accept phenomena as facts. If our hypotheses square with them they stand. If new phenomena are discovered which they do not explain we must frame new theories. There are no questions of ought to be or judgments of value.

It would be most convenient for human purposes if the revolutions of the earth around the sun and the phases of the moon were to be so readjusted that a month would consist of exactly twenty-eight days, four weeks of seven days, and a year of exactly twelve of those months. Obviously the calendar would be greatly improved from man's point of view if this could be arranged. But in the physical sciences we know very well that no amount of human thought can affect the revolution of the earth or the phases of the moon. For those sciences there is no question of what ought to be. There is no praise or blame. There is no good or bad. We must take facts as they are, construct theories of them as they are, and construct our science to tell us what we can do with them and about them.

#### *Physical Science and its Analogies Are Not All*

When everything is called a science, everything begins to be thought of in terms of the physical sciences.

The achievements of those sciences have been so conspicuous, they have been so revolutionary in their effects in many ways, that not unnaturally they have captured men's imaginations. The methods of the physical sciences are held to be scientific method and all that aspires to be science (and not to be scientific is to be relegated to the limbo of superstitions) must proceed by that method. Thus those who pursue the physical sciences may feel a certain superiority in that they are peculiarly in possession of science and scientific method. They may feel that they hold the key to knowledge; that they have acquired the one method of knowledge, so that all branches of learning are bound to be scientific in their sense or else to be cast out as remnants of the crude unscientific past. What they fail to notice is that even if man is not able by taking thought to add a cubit to his physical stature, the history of civilization shows that by taking thought he has been able in the course of generations to add many cubits to his moral stature.

In a fashion of thinking, deeming itself scientific, which rejects all restraint upon the exercise of force by those who are clothed with power, property, which can only be maintained by a regime presupposing mastery over internal or human nature, is sure to fare badly. How much of what we read about the passing of property is simply fashion of the moment and how much has a deeper significance and portends a radical change in what had been from the Roman legal order a chief department of the law? Perhaps this is a question for economists rather than for jurists. But economists are nowadays seeking to take the whole science of law for their province while at the same time they seem as much at sea as to fundamentals or as skeptical as to whether there are fundamentals as are the jurists. At any rate, it is timely to see what jurists are thinking and writing.

#### *Property and Liberty Go Together*

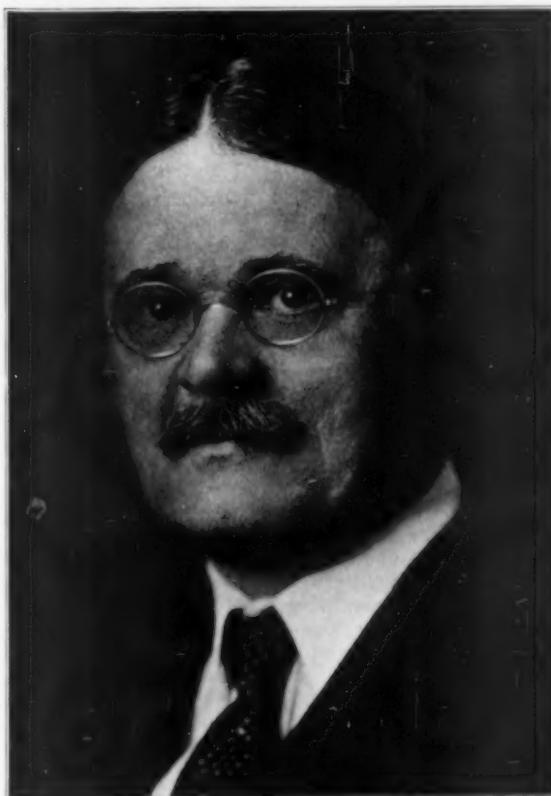
From the time when men began to think about rights and formulate declarations of liberties or assertions of rights, they have put property and exercise of liberties in acquiring and controlling property along with liberty in the fore front. In the Charter of Henry II (1145) the order is customary rights, gifts (which then meant estates conveyed), and liberties. In Magna Carta, next after freedom of the church come the sections guaranteeing property and its enjoyment. The third and fourth sections of the Petition of Right recite the guarantees of freehold, liberties and free customs in Magna Carta and against being put out of lands and tenements in a statute of Edward III. The Virginia Bill of Rights (1776), the prototype of American bills of rights, puts a guarantee against deprivation of property without due process of law before the guarantees of freedom of speech and of the press and of religious liberty. The Massachusetts Bill of Rights (1780) puts an assertion of natural rights of liberty and property in the first article and next after the declaration of political liberties declares that each individual has a right to be protected in the enjoyment of his life, liberty, and property according to standing laws. New Hampshire in 1784 called for an impartial interpretation of the laws and administration of justice in order to preserve "the rights of every individual, his life, liberty, property, and character." Connecticut in a Declaration of Rights in 1776 put a man's "goods" and "estate" along with his person, his character and his family. The Fifth Amendment to the Federal Con-

stitution guaranteed life, liberty and property against unreasonable and arbitrary action on the part of the government and thence that guarantee passed into all the state constitutions in the nineteenth century and was later imposed on the states by the Fourteenth Amendment.

*Property's Chief Danger Has Always Been  
from Rulers*

Nor was this a mere fashion. It expressed the experience of men, and particularly of Englishmen, for centuries of what arbitrary and unreasonable unchecked governmental power, acting upon liberty and property and the use of property, could mean to the individual. At least from the time when a king coveted Naboth's vineyard, the chief danger to property has not been from the covetous neighbor nor from the habitual thief. It has been from the acquisitive and confiscatory activities of rulers. The will to power, the temptation to exercise power simply because one has it, has led rulers to arbitrary interferences with liberty of the person. Covetousness has led them to arbitrary seizures of property. Both have joined to bring about arbitrary interferences with liberty of using property. Some rulers have claimed to do these things merely in title of their power. Some have claimed to do them by divine right. But for the most part rulers have been astute to identify their confiscatory activities with the public good. In Magna Carta, John promised not to take wood for his castles or privately owned carts to haul provisions for his army without paying for them, and all the charters of liberties and bills of rights ever since have provided against taking private property for public use without due compensation. Thus for a long time liberty and property seem one conception. They are dissociated in the nineteenth century, although even then Hegel derives property from liberty, arguing that one cannot be free except as he is free to exercise his freedom freely upon something external to him. It is significant that the current of thought which is giving up the idea of property is also giving up the idea of liberty. As the two grew up together they are a common subject of attack by those who conceive the one must go with the fall of the other. King Demos has shown the same tendencies that called for constitutional checks upon King Rex. He shows the same tendency to justify arbitrary exercise of power because he has it. He makes the same claim to divine right, to which individual rights must give way. He makes the same identification of confiscatory activities with the public good. The experience of the exactions and confiscations and arbitrary interferences on the part of King Rex which was expressed in the old charters of liberties led our forbears to frame bills of rights as checks upon King Demos when he had been set up to rule in the new world. He has been as restive under these checks, as resentful of them as impertinent interferences with his divine right, as hostile to them as impairing the efficiency of his rule, as inclined to override them and to coerce his judges to disregard them, as the Stuart kings ever were.

In the Middle Ages jurists thought about liberties. In the seventeenth century they began to think about rights. They took rights to be qualities of persons which made it just that they have certain things or do certain things, thus joining liberty and property in one conception. Hence the first modern philosophy of rights, though it included property, was at bottom a philosophy of interests of personality, finding a basis



ROScoe POUND

for property in the qualities of a person. Later liberty and property were conceived of as resting upon contract, and so ultimately on the inherent moral binding force of a promise. We are all bound by an original contract to live together in a politically organized civil society in which liberty and property were guaranteed. The nineteenth century, characteristically historical in its outlook, built contract upon property and property upon liberty. The fundamental idea was one of the maximum of free individual self-assertion as the end of the social and legal order. In the sixteenth century, the Spanish jurist-theologians had given us a philosophical theory of restraints upon individual free action. The twentieth century seems to be coming back to this mode of thought, rejecting the idea of rights, making light of liberty, treating rules of law not as devices to maintain rights but as threats of exercise of state force creating duties, and so thinking of restraint rather than of freedom. Moreover, it is not the restraint Kant thought of, a restraint upon the free action of each in order to promote the like free action of all. It is a restraint in order to promote the most efficient operation of a politically organized society either as an end in itself or as a means of advancing the interests of a class rising into power or as a means of bringing about satisfaction of material wants.

*Some Recent Juristic Thinking Emphasizes Restraint  
Rather Than Freedom*

"While the sovereign claims of the common welfare," says Jethro Brown, "are today admitted in form,

the modern multitude, like the aristocracy it has displaced, is apt to assume that its own interest is necessarily identical with the common welfare. It threatens at times to pass under the domination of those who in place of the old notion that the welfare of the majority should be subordinated to the interests of the minority, would substitute the doctrine that the interests of the minority need not be taken into account." Men in all times have tended to worship power. In antiquity the ruler was deified. In more recent times he governed by divine right. Today democracy is taken to be an end, not a form of government, and the people are identified with a majority, which thus becomes something like an object of worship in political and juristic thought. Where power is in a totalitarian state, the state is worshipped as an end in itself. Where it is in a majority the sanctity of Demos deifies the majority. As jurists of the autocratic Roman empire told the emperor that what he willed had the force of law and that he was freed from the laws, as the jurists of the rising centralized absolute ancient regime in France told the king that he was the state, so jurists of today are telling the leaders of totalitarian states and masterful and covetous majorities in democratic states that the nineteenth-century idea of the self-limitation of the sovereign by constitutional checks and our Anglo-American idea of a sovereign people covenanting not to do certain things and not to do certain other things except in certain ways, are contradictions in terms, at war with the very idea of sovereignty, and so mere futilities.

#### *Four Fundamental Ideas That Are Losing Ground*

Rights, liberty, property, law, four ideas which grew up in contests with arbitrary personal rulers, are losing ground and, as we are told by many, will disappear in the society of the future. It is significant that they are losing with the rise of new absolutisms: The omniscient state, an institution in which the individual is no longer the unit, but groups and associations and relations only are regarded; the corporative state which knows only of occupational groups in which the personality of the individual man is lost; the totalitarian state under the unchecked rule of a superman leader to whose wisdom all individual interests must give way; the bureaucratic democracy ruled by absolute bureaus and boards and administrative agencies, by discretion instead of by law, freed from hampering constitutional checks, and free to impose their views of expediency in what for the time being they take to be the public interest or the general welfare. Fundamentally these absolutisms of today are opposed to law, as were the absolute monarchs of the seventeenth and eighteenth centuries. With the rise of these absolutisms all over the world and the resulting cult of power, liberty is coming to be decried in political and juristic thought, property has ceased to be valued in schemes of what is to be secured through the legal order, rights are relegated to the limbo of discarded superstitions, and it is beginning to be taught that law is a disappearing phenomenon.

Marx held, and some of his recent followers have developed the doctrine still further, that law would disappear in the society of the future. He considered that law resulted from the division of society into classes, and hence, when classes disappeared with the abolition of property, the need for law would come to an end and law, too, would cease to exist. Yet, as a recent juristic exponent of Marx tells us, the state as

an organization of compulsion may go on long after law has disappeared. There is to be no law. But there will be one rule of law, namely, that there are no laws but only administrative orders for the particular case. We may see this conception of administrative absolutism contended for and operating under our eyes in America today, and its attitude and the attitude of its advocates toward courts and law and individual rights are exactly those of James II toward Magna Carta and the Petition of Right and the supremacy of law and the maintenance of the law of the land by the courts.

#### *Absolutism versus Liberty, Property, Rights*

Absolutisms have always borne hard on liberty and property and rights, which are the guarantees of both. As we have seen in the history of the bills of rights it has borne on property quite as much as on liberty, so that the two came to be associated even to the point of identification. The administrative absolutism in America today bears equally hard on each. True it does so in the name of the general welfare. But so did Louis XIV, imposing cruel exactions upon the peasantry in order to feed the refractory population of his capital, justify himself as a benevolent father of his people providing for their welfare. The absolute ruler always takes the general welfare for something given. And this idea that the common good is somehow assured by subjecting all individual property and activity and enterprise to the unchecked so-called discretion of ex officio experts is entertained and advocated today by self-styled realists who, in their attacks upon law judicially administered, deny that there is anything given as an assured basis of juristic thought. Their dogmatic general skepticism embraces a dogmatic acceptance of the idea of the general welfare as a maximum satisfaction of material wants, as absolutely as the last century identified it with a maximum of free individual self-assertion.

Duguit tells us that there are no such things as rights. There are only social functions. Kelsen, too, rejects rights. What we call rights are only inferences from threats issued by politically organized society that the force of the political organization will be exerted in a certain way if certain things are done or certain other things are not done. Lundstedt tells us that the law does not confer legal rights to secure interests which it recognizes and identifies with what is just. It makes threats, and rights are deduced therefrom after the event. Thus everything runs back to power, as with Duguit it runs back to a holding of each of us to his place in society as an economic machine. All this is a negation of liberty. "Liberty," says Duguit, "is a function." He adds: "Today each person is considered as having a social function to fulfil and therefore is under a social duty to develop to the greatest possible extent his physical, intellectual and moral personality in order to perform his function most effectively." If the social function of each of us was something determined at birth or objectively ascertained for us at majority by an all wise impartially acting governmental agency, one could say much for this view. But what Englishmen from the twelfth to the seventeenth century and Americans from the seventeenth century to the last generation objected to and sought to guard against by bills of rights is the assumption of such omniscience and omniscience in human rulers and subjection of the individual man to their determinations except as those determinations are made within legal limits judicially ascertained and enforced on the

basis of predetermined principles developed by a received legal technique.

Note how property is tied up with liberty in this theory of state enforcement of social functions. According to the civilians, property involves six rights: a *jus possidendi* or right of possessing, a right in the strict sense; a *jus prohibendi* or right of excluding others, also a right in the strict sense; a *jus disponendi* or right of disposition, what we should now call a legal power; a *jus utendi* or right of using, what we should now call a liberty; a *jus fruendi* or right of enjoying the fruits and profits; and a *jus abutendi* or right of destroying or injuring if one likes—the two last also what today we should call liberties. Thus at least half of the content of a right of property is liberty—freedom of applying as one likes, free of legal restraint. But, says Duguit, "property is not a right; it is a social function. The owner, that is to say the possessor of wealth, by the fact of his possession, has a social function to perform." If he does not perform it, the state is to intervene and compel him to employ it "according to its nature."

#### *International Threats to Rights*

What such ideas may mean in action is well illustrated in international relations. A small state, in the judgment of a powerful neighbor, is not performing its social function in its domain. In the absence of a supernational state, the powerful neighbor steps in to compel employment of the domain "according to its nature." Such things have been happening. Where rights are not recognized they are likely to continue to happen.

Certainly no one claims that the rights and powers and liberties involved in ownership should be unlimited. They have always been delimited by law and the number and extent of the limitations has been growing and doubtless ought to go on growing in the development of an urban, industrial society. The right of exclusion has long been limited by certain emergency privileges and by what are called public rights of boating, floating logs, fishing, and today aerial navigation. The power of disposing is often limited, as by homestead laws, laws against mortgaging household furniture or assigning wages without the consent of the wife, and restrictions on testamentary disposition without providing for the natural objects of one's bounty. The liberty of using is continually restricted today in many different connections. At first, there was a tendency to hold that it could only be restricted in order to maintain the public health or safety or morals. Today, conservation of natural resources, maintaining aesthetic surroundings, securing neighbors against spite are recognized, if not everywhere, yet all but universally. Zoning laws, billboard laws, housing laws, laws as to waste of oil and gas, rules as to taking of percolating water or even as to the conservation of surface water are everyday illustrations. This has been carried so far as to prevent an owner from cutting down a clump of trees on his land where they were part of an exceptionally beautiful view in the neighborhood of a capital city. The laws as to taking out oil and gas and as to taking percolating water belong rather to a category of restrictions on the liberty of enjoying, to which we may now add limitations on the raising of agricultural produce. As to the liberty of abusing, both courts and legislators took this in hand long ago. The Roman law early forbade cruel treatment of slaves. The law has long forbidden cruelty to domestic animals. Statutes

and judicial decisions have dealt with spite fences and malicious diversions of water out of pure spite. While English law has not been willing to create a general liability for malicious exercise of the *jus utendi*, yet it has become willing to prevent exercise of that liberty out of spite to the detriment of a business carried on by a neighbor. The newer codes in the civil law world and the course of doctrinal writing and judicial decision in France have gone far to create liability for what is called abusive exercise of rights.

There can be no quarrel with these developments. They set up legal limits to the rights, powers, and liberties involved in ownership, to be developed by the received legal technique and applied in ordinary legal proceedings by the courts, subject to all the checks with which judicial action is restrained in the interest of individual rights. All this is very different from subjecting these powers and liberties to the discretion of an administrative official given authority to apply an undefined standard with no principles to guide him and free or in substance free from judicial review, or left free to determine for himself what he conceives some not legally formulated policy requires or makes expedient for a case in hand. The one is the due process of law guaranteed by the constitutions, state and federal. The other is the sort of governmental action involved in the contests between courts and crown which culminated in the bills of rights.

#### *Public Control Can Destroy Ownership*

It is true that regulation, limitation of the liberties involved in ownership, may go so far as to amount to taking. What Duguit calls the socialization of property may be carried to the point of confiscation or abolition. Although doubt has been cast recently on Chief Justice Marshall's proposition that the power to tax is the power to destroy, the history of taxation in the hands of rulers free from legal restraint bears it out, and, at any rate, it has been recognized by high authority that regulation may easily run into destruction. "A strong public desire to improve the public condition," said Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415, "is not to warrant achieving the desire by a shorter cut than the constitutional way of paying for a change." This observation was quoted and approved recently by Judge Lehman in *Aruerne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 231. These cases remind us of the pressure which legislation and administration constantly exert to carry regulation beyond the confines of regulation, and the consequent need of both the guarantee of due process and the guarantee against taking for public use without due compensation if individual rights of property are not to be destroyed. In other words, undefined ideas of public policy and legally unfettered discretion are perennial threats to property, and hence public policy and discretion have been two things on which property lawyers have always looked with suspicion.

#### *"Discretion"; Public Policy An Unruly Horse*

Discretion is used in two senses. In the sense which it commonly bears in the law it is a power of determination of questions to which no rule of law is applicable, which is left to the personal judgment of the tribunal, to be exercised according to settled principles. This is judicial discretion and is always reviewable to the extent of ascertaining that a real judgment has been exercised according to the governing principles and not arbitrary will or caprice. This has long been established in equity and has been reaffirmed

recently in a considered opinion in the Probate and Divorce Division in England. In another sense it means a power of determination left wholly to the judge or official with no principles to guide its exercise and no review unless for fraud. This was the sort of discretion Selden had in mind when he compared the Chancellor's conscience as a measure to the length of the Chancellor's foot. It is the sort which Lord Camden called "the law of tyrants." He added: "It is always unknown. It is different in different men. It is casual and depends upon constitution, temper and passion." The law has always sought to restrain this sort of discretion by subjecting it to judicial review to prevent abuse. When any agency of adjusting human relations or regulating human conduct seeks to be given a discretion freed from judicial scrutiny, we may well suspect it seeks a discretion of the second type.

One can understand why Lord Camden's saying was preserved for us by a writer on the law of real property.

English judges have consistently been very cautious about making use of new ideas of public policy. In the great case of *Egerton v. Brownlow*, in which all the judges and law lords discussed the matter elaborately, public policy was said to be an unruly horse, and in more recent cases, right down to the current year, English courts have refused to extend limitation of legal rights by public policy beyond cases well settled through judicial experience or declared by legislation. To turn determination of questions involving limitation of rights or regulation of their exercise over to administrative agencies to be made on legally undefined ideas of public policy, free from the checks involved in the judicial process, runs counter to the whole course of legal development in the English-speaking world. Yet it is much urged in political and juristic thinking of today.

As yet the ideas of disappearance of law and administrative absolutism have not much affected the law of property as administered in the courts. The law of property is chiefly in the form of rules. There are principles and conceptions. But standards, which involve a large measure of discretion, belong to another field of the law. Perhaps for that reason administrative regulation of the liberties involved in ownership is likely to be advocated in carrying out schemes of making over the social order. The common law doctrine of supremacy of the law, which thinks of public law as a branch of the law of persons, which treats public officer and private individual as equal before the law, each held by the ordinary courts in ordinary legal proceedings, according to the ordinary law of the land, to keep within the bounds of the law and of reason in what he does that affects the interest of others, is the basic guarantee of liberty and property.

In the juristic thought of today it is threatened by the coming in of a radically different idea of public law from the books of Continental Europe.

#### *Administrative Control is Not Law*

An English writer tells us that public law is gradually eating up private law. Housing and planning legislation, he says, "takes the law of property under public control." By this he does not mean, of course, that control through the courts is not public control. He means administrative control, outside of the limitations of the law of the land, as contrasted with judicial control. For in recent juristic thinking on the Continent we are taught that public law is in necessary opposi-

tion to and has primacy over private law; that public law is a subordinating law, putting a higher value on the official and on what he does than on the individual and his interests, whereas private law is a co-ordinating law, treating all as equal before it and so putting no higher value on official acts. In this way of thinking, whatever is done officially is law. Hence whatever is done administratively has a superior value as law in and of itself. Likewise as administrative action, called law, is a subordinating law, it puts a higher value on some groups and classes and their claims than on others according, so we are told, to measures of its own. It is this sort of public law which James I sought to establish in his colloquy with the judges of England.

A public law of this sort is understandable if we accept the doctrine of a necessary class war of which law is an inevitable product—a product that will cease to be in the propertyless society in which there will be no more classes. But it is curious that those who with one breath argue for a sovereign principle of social interdependence should in the next breath argue for class war and a law avowedly administered and to be administered in the interest of the politically stronger class.

#### *Justice and Security May Exist Together*

In the past juristic thinking has been grounded on philosophy which has furnished both a directing or creative and a stabilizing and organizing method. Today the fashionable philosophies behind the fashionable juristic thinking are give-it-up philosophies which disclaim the possibility of directing or creating or stabilizing. They are relativist or phenomenalist or realist or all three. To the relativist there is an irreducible contradiction between justice, the ideal relation between men, and security. When we seek through law to achieve the one we lose the other. Value judgments are purely personal and subjective. None of them can be proved except in the system of the particular thinker, and his system can not be proved even to himself. Hence every one is entitled to his own and no one can say his is better than another's. To the phenomenalist phenomena must be accepted as the facts we are to accept and not vainly criticize. The items of behavior of officials are behavior phenomena justified by their own phenomenality. To the realist the significant thing is power—the power of officials to make and execute threats to employ the force of politically organized society. It is illusion and superstition to believe we can restrain exercise of that power. Exercise of it will be governed, in spite of formulas and so called principles, by the self interest of the dominant class, of which judges and administrative officials are but mouthpieces. Or, if we look at psychological realism, we learn that it is psychologically impossible for a human being to exercise a power of determination objectively and impartially. What he decides is the result of his individual temperament and prejudices and environment.

#### *Liberty, Property, and Law Are Products of Civilization, and All Three Will Endure*

In contrast, the philosophy of the formative era of American institutions was creative. Men believed they could do great things and so they were able to do them. They believed that a people politically organized as a democracy could bind itself to respect life, liberty, and property and could covenant that those who wielded its power for the time being should do

# PUBLIC OPINION AND THE PROFESSIONS\*

By ARTHUR T. VANDERBILT

I WELCOME this opportunity to address you this evening for three reasons: first, because your guest of honor, Dr. Rock Sleyster, has been a pioneer in the practice of psychiatry and is recognized as such throughout the country; secondly, because Wisconsin (if I may judge from my experience with your lawyers and your judges, for there is no court in any state in the Union that is more illustrious than your Supreme Court) typifies an open-minded, impartial approach to the problems of the day; and, finally, because the bench and bar of this country owe much to the medical profession by way of inspiration in their efforts to improve the administration of justice in the United States. I have often thought as I have worked over these problems what it would mean to the country at large if our professional men, particularly those in medicine and the law, in journalism and in teaching, were so organized as to give the nation the benefit of their combined experience. In their respective communities, the physicians and the lawyers, the journalists and the teachers have had a predominant part in molding popular opinion. Their views have been sought because by and large they have been disinterested. In the national field, however, and to a somewhat less degree in the sphere of the several states, their influence has not been so potent because of defects in training or inability to work in cooperation with their fellows, though of all these groups the medical profession has made the most progress.

You have met here tonight, and appropriately so, to do honor to your fellow citizen, the President of the American Medical Association. It is fitting that you should do this, for there is no greater honor that can come to any man than to be called to the leadership of his profession. But if I read aright the mind and character of your distinguished President, he is not thinking in terms of honor or of power, but rather he is filled with a sense of his high responsibility, of

obligations to be fulfilled, of opportunities to be met. He comes to office at a time when your profession has been subjected to official attack and when issues which have been publicly agitated for years are therefore being drawn to a head.

Let us briefly look at the national scene in medicine through his eyes. He can say with assurance that the past at least is secure. As this country has developed over the last three centuries from a sparsely inhabited strip along the Atlantic seaboard to a teeming nation of one hundred and twenty million souls spread across a vast continent, the physician—first on horseback, then with his horse and buggy, more recently with his automobile, and now occasionally, in emergencies, with his airplane—has placed his skill and his devotion to duty at the service of his community. It is not necessary for me to indulge in any panegyric on the American physician. Suffice it to say that our nation and our time have been better served by its physicians than has any other nation or any other time. The honor and the respect and the affection which has been traditionally accorded to the physician in his community is the best proof that one could want of the realization by those he has served of his usefulness and of his devotion to the needs of mankind.

## *An Inspiring Record*

But more inspiring even than the influence of the practitioner in his community is the record in the field of medical discovery and scientific research. There is no book on the history of the world so fascinating as the story of the development on this continent of the world's greatest experiment in democracy and human liberty, and in that book there is no chapter so full of romance, of courage, and of far-reaching victory for humanity as the history of medicine in America. The use of anaesthesia is so taken for granted by all of us that it is difficult for us to comprehend the suffering which has been obviated since the discovery in this country in 1846 of its use for surgical purposes. From then on not only had surgery new possibilities, but the entire field of experimental research was uncovered. The long history of the conquest of one disease after

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so reasonably under God and the law. That idea, on which our polity was founded, is under attack from many sides. Some say it is psychologically impossible. Some say it is logically impossible since the very idea of government negates it. Some say it is a mere product of a class organized society and must disappear. Some say it never was more than a pious illusion—that law never was more, and in its nature is nothing more, than whatever is done officially. Some revert to the ancient deification of rulers and, putting their faith in the divine right of the majority for the time being, consider any legal limitation of majority action, in the language of the Year Books, impertinent to be observed. For the moment, then, indeed since the world war, we are living under a gospel of power. Law is whatever can get by.

But the whole history of civilization refutes this philosophy of give up. At least half of civilization, and the half without which the other half could not

have been achieved, is the conquest of internal or human nature, the subjection of internal nature to the exigencies of social life. If in the course of this conquest men have developed or set up political power and agencies of exercising it, they have also developed or set up legal institutions for making the exercise of that power uniform and systematic and predictable. Liberty and property, so the most advanced of recent realists tell us, are products of law which is a product of class domination. I submit that liberty, property, and law are products of civilization and that it has proved possible to hold down by law all domination, sacerdotal, military, political, or economic, by legal institutions. The English-speaking peoples have stood with the Romans as the builders of law for the world. The Romans gave us administrative organization and method. The English gave us judicial organization and method. With these two in balance liberty and property are secure.

another—cholera, bubonic plague, typhoid fever, hookworm, and malaria—has no story more dazzling with high courage and scientific intelligence than that of Dr. Walter Reed and his human guinea pigs who discovered the cause of yellow fever. Their high courage and scientific intelligence vanquished a perennial threat to the health of all mankind. Diphtheria and the diseases of children generally have yielded to scientific assault, with the result that infant mortality is now in many communities one-fifth of what it was at the turn of the century. Although much remains to be done and although the millennium from the standpoint of public health has not yet been attained, here surely is a record of which any profession or any nation may be proud. Here are men in our day who have caught the vision and have lived the life of which Kipling so nobly sang:

"And only the Master shall praise us, and  
only the Master shall blame;  
And no one shall work for money,  
and no one shall work for fame;  
But each for the joy of the working,  
and each, in his separate star,  
Shall draw the Thing as he sees It  
for the God of Things as They Are!"

The discoveries in medicine, which are legion in number, would be of no avail without practitioners, trained and skilled in applying them to human needs. As a result of the survey made by Dr. Simon Flexner and the work of the American Medical Association, the number of medical schools has decreased from 160 in 1904 to 77, I believe, at the present time. As the inferior medical schools have been weeded out, the standards of medical practice have been raised. Now there are but three states that do not require at least two years of pre-medical work in college, and there are over forty states that require graduation from an approved medical school. For this result, of which every man, woman and child in the United States is the beneficiary, full credit must be given to the American Medical Association. I blush to tell you that during this same period of thirty-five years the number of law schools has increased from 102 to 180, and the increase in the number of law schools has been accompanied by no corresponding general increase in standards for admission to the bar, despite the tremendous growth in the field of the law. Legislators who can see the necessity of competent medical service shrink from according the privilege of the same sort of competent legal advice to their constituents in the fancied interest of some mute, inglorious Lincoln. Always when the bar desires to move forward it is this imaginary Lincoln who must be met and vanquished. As a matter of plain historical fact, Lincoln, when he was admitted to the bar, had a better general education than most of the bright young men who are graduating from our best law schools these days. He could think; he could express himself on paper and in public debate; he understood men; and he knew much of the world's best literature. My respect for Lincoln the lawyer, as well as Lincoln the statesman, prompts me to do my bit here to dispel the myth of Lincoln the ignorant. The medical profession, fortunately, has not had to cope with modern mythology in its effort to give the public the quality of medical service to which it is entitled and to extend medical education to the new and useful fields of public health and psychiatry.

#### *The Consequences*

Now, what are the results of all these things? In the first place, according to an account in the New York Times of last Sunday, the statisticians of the

Metropolitan Life Insurance Company report that the expectation of life in the United States today is twelve years greater than it was at the turn of the century, and this despite the World War, the devastating outbreak of influenza twenty years ago, and the greatest economic depression this country has ever experienced. In 1901 the expectation of life at birth in this country was 49.24 years. By 1937 it had advanced to 61.48 years. Considering only the white population, the statisticians point out that according to the mortality rate prevailing in 1901 almost half of the male babies born in that year would have died before reaching the age of 57, but in 1937, because of changed health conditions, the age would be advanced to 67, or a gain of ten years. The corresponding ages for girl babies are 61 years and 72 years. In short, every citizen owes at least one-fifth of his years of expectancy of life to the advances of medical science in the last half century, not to mention a much more comfortable living throughout his whole span of life. Here is a record that one would think would have endeared the medical profession to every sane person. And yet we find instead of gratitude a vociferous, but fortunately not general, clamor of dissatisfaction voicing a demand for the best of medical services for all at little or, according to some, at no cost whatsoever.

Coupled with this agitation, which affects the medical profession directly and which has been, naturally enough, receiving its attention the country over, are two other consequences of deepest significance in our social economy. The increase in life expectancy has not only vastly augmented the number of older people in the community, many of whom must be taken care of, but it has also, to a considerable degree, been responsible for the present unemployment throughout the nation. If the rules of the game of 1901 were in force today, there would be eliminated from the American scene the millions who are causing the unemployment problem in America, though I doubt if even the severest critics of the medical profession would hold it personally responsible for this unanticipated result. There is a second fundamental problem affecting our national economy in which the physicians of the country have played an important part. The economists tell us that our American civilization has been built up for at least a century and a half on the premise of a constantly increasing population. Now, due to the widespread practice of birth control and the substantial cessation of immigration, the statisticians tell us we are facing a static, if not a declining, population, a condition which the economists assert calls for an entirely different social and business organization than existed in the period of increasing population. A growing boy requires a different diet and regimen than either a man in full strength or in withering old age. Here are problems the social implications of which may well engage our attention.

#### *Present Discontent*

Let us consider the alleged causes of the present discontent with the medical profession. First of all, it is said that the rich only can command the services of the best practitioners. Next, it is alleged that the average doctor neglects his medical education after he leaves school and that therefore a majority of the profession are not abreast of the times. Again, it is asserted that professional etiquette stands in the way of a patient's rights, both with respect to hospitals and other branches of medical service. Finally, it is charged that the average practitioner and the organized profession alike lack the social point of view in dealing

with such national problems as abortion, birth control, and pure drugs. The remedy, of course, is "there ought to be a law," and that law, these critics would have us believe, is the entire control of medicine by the state.

Without entering a general denial to the indictment or claiming perfection for a profession made up, after all, of human beings, without pleading in confession and avoidance the twelve years of added life and the immeasurably greater comfort that have been bestowed on the average citizen as a result of medical progress in the last half century, without claiming credit for the tremendous amount of charity work done by the physician, both among his own patients and in the hospital clinics, let us endeavor to diagnose our problem. First of all, it is to be noted that the discontent is not limited to the medical profession alone. It extends to all professions and to all institutions. It seems to be universal. Imagine a nation with only 6% of the world's area and 7% of its population, owning 33% of its railroads, using 48% of its coffee, 56% of its rubber, owning 60% of its telephone and telegraph lines, consuming 70% of its oil, 72% of its silk, using 80% of its motor cars, having one-half of its monetary supply, fifteen billions in gold, and two-thirds of its banking resources, and yet, due to obvious maladjustments, discontented and in many quarters bitter. Discontented ourselves, we have in turn become the cause of discontentment elsewhere. Not so long ago the Brazilian Ambassador ascribed the growth of fascism in his country largely to the bitterness engendered there by the fact that American labor had twenty times the income of Brazilian labor. Discontented ourselves, we are of all nations the most envied.

#### *How It Came About*

We cannot but wonder how it all came about. The problem dates further back than the World War and the great depression. In the last analysis it has come from our habit of taking civilization, liberty, and democracy for granted. We have forgotten that the history of Western civilization has been essentially the history of the growth of human liberty and freedom. We have forgotten that every step in the progress of centuries has been attained only by heroic effort and suffering and generally with much bloodshed. With the Renaissance came intellectual freedom. With the Reformation came religious freedom. With the American Revolution and the French Revolution came political freedom. With the Industrial Revolution and the development of natural science came a degree of freedom from the forces of nature theretofore unknown. This freedom, in all of its aspects, we have taken for granted.

All too many of us have very little real conception of the nature of liberty. We like to declaim about "our ancient liberties," forgetting that if our liberty is merely ancient it is no liberty at all, because to be liberty for us it must be of the present. We fail to remember that liberty in its higher aspects, at least, is not an incorporeal hereditament to be handed down by operation of law from generation to generation. We fail to realize that liberty is something that must be positively and aggressively achieved by each successive generation or else be lost to that generation, and probably to its successors. One of the great grounds of discontent today is that liberty, freedom, and civilization are not automatic. We resent the fact that we, like our forefathers, must fight in our day for freedom.

The other ground is the world-wide struggle for economic freedom. Emerson puts it tersely:



ARTHUR T. VANDERBILT

Former President of the American Bar Association

"Things are in the saddle  
And ride mankind."

In some countries, the earlier aspects of freedom, attained by much toil and bloodshed, are being sacrificed in the struggle for economic freedom, a struggle which thus far has yielded anything but the desired result. In the struggle for things, greed and lust for power have bred intolerance, and intolerance is forever incompatible with freedom. On at least four continents the forces of ignorance, tyranny, and oppression stand arrayed against the powers of reason, of law and of human liberty, in preparation perhaps for the ultimate titanic conflict to decide the type of civilization, if any, that will survive. In bewilderment, the entire world seems to be dividing into two classes, one believing vainly that whatever is, is right, the other believing equally vainly that whatever is, is wrong. Strangely enough, most of these beliefs center around things. The high domain of the intellect, of the conscience, of man's relation to his fellows and to his community are either taken for granted or treated with scorn. Reason and common sense, as well as the life of the spirit, are in danger of being crushed between the upper and nether millstones of the forces of materialistic conservatism and of materialistic radicalism.

#### *Present Needs*

Is it not obvious that what is most needed today in this enormously rich but very discontented country of ours is a clearer perspective on life as a whole? True, there are doubtless many things that need correction, in medicine and everywhere else. Manifestly, the millennium cannot be reached overnight. Perfection is not to be attained by legislative fiat. What is needed now, above all things, is unselfish, enlightened civic leadership. Here is where, I submit, our professional men—our doctors and our lawyers, our journalists and our teachers—have a duty to perform that they cannot dele-

gate to anyone else. They, above all others, are equipped to see the necessities of our situation and to suggest appropriate remedies. And as we cast our eyes today toward Europe can there be any doubt that our greatest duty is the preservation of our ancient liberties?

"For what avail the plough or sail,  
Or land or life, if freedom fail?"

You may ask what all this has to do with meeting subversive attacks on modern medicine. I give you my answer without hesitation. The physician, like the lawyer, must be a citizen first or he will eventually find that he is not a physician at all. If you doubt this, I ask you to look at the plight of professional men in the totalitarian states of Europe. Every physician, when he takes the Hippocratic oath, every lawyer, when he signs the roll of his court on admission to the bar, should also be obliged to take an oath like that taken by the boys of Athens on admission to the army:

"We shall never bring disgrace to this, our city, by any act of cowardice, nor ever desert our suffering comrades in the ranks. We will fight for the ideals and sacred things of the city, both alone and with many. We will revere and obey the city's laws and do our best to incite a like respect and reverence in those above us who are prone to annul or to set them at naught. We will strive unceasingly to quicken the public's sense of civic duty. Thus, in all these ways, we will transmit this city not only not less, but greater, better, and more beautiful than it was transmitted to us."

Once the disinterestedness, the capacity for leadership, and the vision of our professional men have been accepted by their fellowmen, I have little concern as to the correct solution of purely professional problems. They will be solved the country over, as they are being solved today in your state and mine, by patiently seeking out what is needed in each community and then devising the best available ways and means of satisfying those needs, even though they may involve some departure from what has heretofore been done. Such methods cannot fail to carry their appeal to an intelligent public.

#### *A Word of Caution*

There is one word of caution, however, that must be uttered to physicians and lawyers alike; indeed, to all professional men. To be effective, your advice must be as disinterested as it is humanly possible for it to be. Lawyers and judges are all too prone to imagine that the courts exist for their benefit. They need to be reminded every so often that the courts exist—indeed, that the lawyers and the judges exist—primarily for the benefit of litigants and the state. Accordingly, it may not be amiss to ask physicians to keep constantly in mind that they exist primarily for the benefit of their patients. During the year that I was President of the American Bar Association the publications of substantially all of the bar associations and of many of the medical associations found their way to my desk. It did not take me long to tell in what states progress was being made. It was in those states, of course, where the public point of view was being emphasized. By that I do not mean socialized medicine or the regimentation of the bar—far from it—I mean the point of view that I have just been emphasizing, that puts service first. I am convinced that if this point of view is predominant the best interests of the public will be served by voluntary associational methods free from governmental regimentation. It was only where I saw the suggestions and implications of the power of a profession as a pressure group that I became apprehensive. The pub-

lic cannot be expected to understand the technical involvements of professional problems, but it is very quick to suspect and very eager to learn whether or not these involvements are in its interest or professionally selfish. Whatever else it may be, a profession cannot become a pressure group and remain a profession in the true sense of the term. No, the professional man's interest in public affairs if he is to be entitled to full faith and credit must be distinguished by its disinterestedness, its devotion to the public point of view. He must take the position that Lincoln characteristically took when he said:

"I do not have to win, but I do have to be right."

This attitude is not merely idealistic; I say to you after twenty-five years in the game that it is just practical politics in the best sense of the term. The man who is right can't be beaten in the long run, but how long, how very long, it seems to take the doubting Thomases among our professional brethren to understand this obvious political truth!

#### *Cooperation of Best Minds Essential*

There is another aspect of public relations that I desire to call to your attention. There are problems that cannot be solved by any one man or any one profession alone. I have referred to the social and economic problem of unemployment resulting from the salutary increase in human life as a result of the medical progress of the last half century. I have mentioned the problem to our national economy resulting in the change from an increasing population to a static population, with the prospect of a declining population, as a result of the practice of birth control and the cessation of immigration. These problems are fundamental. They are of nation-wide importance. They cannot, I submit, be solved either by bureaucratic methods or by debate in the halls of Congress. There is no limit to their variety. Let me give you one more example. There can be no doubt that with the requirements of college education, professional school, and internship and clerkship the entrance of our young men into the practice of their chosen professions is being too long delayed. They individually, as well as society, are being deprived of some of their best years. On the other hand, education for both professions is subject to the charge—and I think with a great deal of justice—that it is too narrowly technical. We do not seem to be developing an overabundance of Sir William Oslers or of lawyers of the type of Mr. Justice Holmes. I do not see that our students can work much harder than they do in our professional schools. I suspect that some of the difficulty is in our colleges, but most of it, I have no doubt, is in our secondary and primary education. Only cooperation of the best minds in all the professions can give us the answer to these intricate problems. I submit that each profession in a democracy owes it to the country to give the best of its leaders to the solution of these vital issues. Their task will be no easy one. Each of them, to quote Mr. Justice Holmes, himself the son of a great doctor, must

"learn to lay his course by a star which he has never seen,—to dig by the divining rod for springs which he may never reach."

Holmes then goes on to remark:

"For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists."

Can there be any doubt today that we stand in need of such heroes and their heroic work? Where can such heroism and idealism be found better than among the leaders of our professions?



Honorable  
Pierce  
Butler,  
Justice of the  
Supreme  
Court  
of the  
United States

#### THE DEATH OF MR. JUSTICE BUTLER

In the Supreme Court of the United States on Thursday, November 16, 1939, the Chief Justice said:

"It is my sad duty to announce the passing, early this morning, of our brother, Mr. Justice Pierce Butler. After a long and distinguished career at the Minnesota Bar, he was appointed Associate Justice of this Court and took his seat in January, 1923. Trained in the exacting school of a most active professional practice, Pierce Butler brought to this Court not only his learning in the law, but a rich store of practical ex-

perience. His fidelity, his courage and forthrightness, which were his outstanding characteristics, made him a doughty warrior for his convictions, and he served the Court with great ability and indefatigable industry and an unwavering loyalty to its traditions and to his lofty conception of its function in preserving our constitutional heritage.

"The funeral services in Washington will be held tomorrow morning at 11 o'clock at Saint Matthew's Cathedral, and the Court will attend. A committee of the Court composed of Mr. Justice McReynolds, Mr.

Justice Stone, and Mr. Justice Roberts will attend the services to be held in St. Paul.

"As a further token of respect for the memory of our brother, the Court, immediately upon the conclusion of the hearing in the case now on argument, in which counsel from the Pacific coast are engaged, will adjourn until Wednesday, November 22 next, at noon."

The President of the United States, on being informed of the death of Justice Butler, said:

"I have known Justice Butler for a great many years. I always regarded him as a personal friend. His undoubtedly great ability, his complete frankness in the expression of his philosophy and his honest convictions commanded my respect and, in common with his many friends, I sincerely regret his untimely passing."

Attorney General Murphy said:

"America has lost in Justice Butler one who served with ability and faithfulness, not only his fellow men but the democratic system under which he lived. He took his stand on the grave issues of our times with a rugged integrity and unwavering obedience to his conception of the right. So doing, he gave strength to our process of choosing the Nation's course by the thoughtful weighing of conflicting views."

The Solicitor General, Mr. Robert H. Jackson, said:

"The death of Mr. Justice Butler removes from public life one of its most industrious and sturdy and conscientious men. I often, in fact generally, disagreed with his social and economic philosophy, but that does not prevent recognition of his sincerity, his very strong and clear intellect, and his indomitable character. He has been a powerful factor in the events of his time."

Learned Hand, senior judge of the United States circuit court of appeals for the second circuit, said:

"Justice Butler's long career upon the Supreme Court has made us all familiar with his vigorous personality. His ardent nature, his great industry, his untouched honor, and his loyalty to the ideals of his early manhood, have for a long time marked him as a large figure in the court. He lived to see those ideals much modified and more, without abating the depth of his convictions; and honest men will value him for this, even when they do not share his views. There is in the end more value to society in stout-hearted convictions, whatever they may be, than in facile conplaisance to regnant fashions, however admirable in themselves."

## London Letter

### The War and The Bar

IN England it has been asserted that, except in some special branches of law, the Bar is one of the first of the professions to feel the ill effects of war, and probably the last to recover from such effects. This particular war seems to be lending some support to that assertion. The Divorce Court is still very busy, in fact more so than at the beginning of the past legal year, and it is anticipated that there will be a considerable amount of business in the Prize Court. In other directions, however, work at the Bar has decreased, although, it must be admitted, not so seriously as was anticipated. Some of the leading lights have given up practice altogether in order to devote themselves entirely to the service of the nation, while a very large number of juniors have joined one or other of the fighting services.

It is only necessary to recall some of the names appearing on the Roll of Honour of the Inns of Court in the last war, and to contemplate the tables placed in the Temple Church to their memory, to appreciate the wonderful response made by Members of the Bar when their country needed them a quarter of a century ago. Now the new generation of lawyers—together with a good sprinkling of the old—has made a similar response, and as *omne actum ab intentione agentis est judicandum*, it is fitting that the Bar should wish to help in teaching the aggressor the justice of the old maxim *sic utere tuo ut alienum non laedas*.

The General Council of the Bar has compiled a list of barristers who by reason of their age or disability are not likely to become eligible for service with the Forces of the Crown. From this list it is proposed to make recommendations to the Governmental and other public authorities for appointments to posts for which members of the Bar are particularly suitable.

During the last war, many of those who served did so at very considerable loss to themselves and, upon their return found that the practice which they had enjoyed had literally vanished. In order to avoid a repetition of this hardship the General Council of the

Bar has had the matter under consideration and the following resolution has been passed:- With the object of preserving as far as possible the practice of every barrister who is unable to attend to it owing to service in H. M. Forces or other whole time public service in connection with the war, the General Council of the Bar hereby resolves:

### When Your Brother Lawyer Is At The Front

1. That every barrister remaining in practice should make it a point of honour (a) to do what he can to ensure that every serving barrister shall get back his practice when he is able to resume work at the Bar; (b) meanwhile, so far as is reasonably practicable, to do any work for any serving barrister which is entrusted to him, whether or not he has been in the same chambers, or whether he is senior or junior, on such terms as to sharing fees as they shall agree, and, in default of any agreement, sharing fees equally, other than the clerk's fees, which should go to the clerk of the barrister who does the work. The above applies both to King's Counsel and junior counsel, but so that no King's Counsel may do work for a junior counsel nor junior counsel for a King's Counsel: (c) that any barrister doing work for a serving barrister should after his signature to pleadings or other documents add the words "for (A. B.) absent on war service," and if holding a brief shall state to the court that he is holding it in the absence of (A. B.) on war service.

2. That a serving barrister shall be entitled to send or have sent on his behalf to every professional client a notice with a covering letter in a form which has been approved by the Bar Council and the Law Society, indicating (if he is in a position to do so) the name or names of any barrister or barristers with whom he has made actual arrangements to do his work when possible.

3. That on his return to practice a serving barrister shall be entitled to notify those who, prior to his departure, had been his professional clients that he has returned to practice at a given address.

4. That it shall be a point of honour to inform a solicitor who has delivered or is proposing to deliver a brief or instructions for a serving barrister of the

effect of this resolution, and to invite him in delivering or transferring the brief or instructions to add to the name of the barrister selected by him (whether or not one of those named pursuant to paragraph 2) the words "in the absence of (A. B.) on war service."

5. That any barrister to whom a brief or instructions may be delivered in circumstances to which the foregoing paragraphs apply (even if the name of the serving barrister is not endorsed upon them) shall make it a point of honour where reasonably practicable to accept the papers and to do the work and to account to the serving barrister for an agreed proportion of the fee when paid, or, in the absence of agreement, for half the fee.

### *The Courts*

To the great relief of those who remain to carry on their practice it has been decided, at all events for the time being, not to move the Courts to various places in the provinces, as was the former intention. There is no doubt that such a move would have created much difficulty and not a little hardship. The cost to members of the Bar, solicitors and others of travelling backwards and forwards from their homes to the Courts, or of setting up another establishment close to the Court in which they intended to practice, would have been a very great strain upon incomes already reduced by shortage of work and very considerable increase in taxation.

### *The Inns of Court*

In spite of the fact that the Inns of Court are experiencing a loss of revenue, due to the termination of tenancies by some of their members who have enlisted in the various services, they are carrying on as usual. New students are being admitted, though not in such large numbers as is normally the case. The libraries are all performing their usual functions, but it has been found necessary to shorten the hours of opening, to enable those readers who live at a distance to reach their homes before the nightly blackout is due to commence. It may well be that, when the official daylight saving time ends, it will be necessary still further to curtail the hours. Dining terms have been cancelled until further notice, and the necessary dispensation from keeping terms by dining in Hall will be granted. But no student will be eligible for Call to the Bar until such time as would normally have been his twelfth term. It will be remembered by American readers that, in normal times, terms in the Inns of Court are kept by dining in Hall on six nights during each of twelve terms—a fact which has given rise to the assertion that in England it is necessary to eat one's way to the Bar, and that success depends as much upon a good digestion as upon mental ability. Lunches are still served and, although there may not be quite such a wide variety of dishes from which to choose, there is certainly no diminution in the quality or quantity provided. In two of the Inns it has been decided that no further awards of prizes or scholarships usually offered by them will be made at present, and it is believed that the other two Inns will make a similar decision.

### *Protection of Records, Stained Glass Windows, Etc.*

All precautions have been taken to protect the property of the Inns and the lives of their members and residents. Records and other valuable manuscripts

which cannot be replaced have been taken to places of safety. The priceless stained glass in the windows of the famous Middle Temple Hall has been removed and safely stored, and the pictures, including the well known one of Charles I, have been similarly dealt with. All of the Inns have provided shelters for use in case of air raids, and the more vulnerable places have been strengthened and further protected by sandbags. In Fountain Court an improvised barricade has been placed around the fountain so that pedestrians will not fall into it in the darkness. Trees, lampposts, corners of buildings, staircases, and edges of pavements have been whitened to assist residents and others in finding their way about. The darkness of the Temple on a starless night must be experienced to be believed.

### *Legal Education*

Bar examinations are being held as usual and lectures are to be continued, but the programme of lectures has been modified slightly to meet war conditions. At the same time every endeavour will be made to cover the scope of the Bar examinations. The Law Society, which exercises control over the other branch of the legal profession, is also continuing to hold examinations, but the Law School was not re-opened after the Long vacation.

### *Emergency Legislation*

"Ignorance of the law, which everyone is supposed to know, does not afford an excuse," but one wonders if even those who are responsible for administering it have been able to satisfy themselves that their knowledge of the Emergency Legislation which has been passed since the beginning of the war is complete. At the time of writing (fifty-one days after war commenced) no fewer than fifty war measures have found a place on the statute book—most of them during the first fortnight. There are, in addition, well over three hundred Orders and Regulations which have been made under their provisions. This represents probably the greatest legislative effort ever made in this country. The last war had been in progress for two years before a similar stage had been reached.

### *Lord Chancellor*

One of the most interesting changes in the Government from the legal point of view is the resignation of Lord Maugham from the Lord Chancellorship and the appointment of Sir Thomas Inskip as his successor. Lord Maugham, who was appointed Lord Chancellor last year in succession to Lord Hailsham, was called to the Bar at Lincoln's Inn in 1890, and became a Bencher in 1915, two years after he had taken silk. He was a Judge of the Chancery Division of the High Court from 1928-1934; a Lord Justice of Appeal, 1934-1935, and a Lord of Appeal in Ordinary, 1935-1938. The King has conferred upon him the dignity of a Viscountcy.

Sir Thomas Inskip, who has also been created a Viscount and has taken the title of Viscount Caldecote of Bristol, was called to the Bar at the Inner Temple in 1897, and was made a Bencher of his Inn in 1922, when he was appointed Solicitor General. In the last war he was attached to the Naval Intelligence Division of the Admiralty and later was Head of the Naval Law Branch. He was also the Admiralty Representative on the War Crimes Committee, 1918-19. He was Attorney General from 1928-1929 and again from 1932-1936.

The Temple.

S.

### HENRY P. CHANDLER NAMED DIRECTOR OF NEW ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

Chief Justice Hughes announced on Nov. 22 that the Supreme Court has appointed Henry P. Chandler of Chicago, to be director of the administrative office of the United States courts, under the terms of a recent statute. Mr. Chandler is a member of the Illinois bar and of the bar of the Supreme Court. He was graduated at Harvard in 1901 with the degree of A.B. and at the University of Chicago Law School in 1906 with the degree of J.D. He has practiced law in Chicago since 1906 and for many years has been a member of the firm of Tolman and Chandler. Mr. Chandler was secretary to the President of the University of Chicago from 1904 to 1906. He was president of the City Club of Chicago from 1923 to 1925, and of the Union League Club of Chicago from 1932 to 1933. He was president of the Chicago Bar Association, 1938 to 1939, and chairman of the section of municipal law of the American Bar Association during the same period. He was chairman of the committee on child welfare legislation, by appointment of the governor of Illinois, which made comprehensive studies and reports from 1929 to 1933, and from 1934 to 1938 he served as special master in chancery in various cases by appointment of the United States district court for the northern district of Illinois. For many years he has been an outstanding leader in Chicago civic affairs.



HENRY P. CHANDLER



ELMORE WHITEHURST

### ASSISTANT DIRECTOR APPOINTED

The Court has also appointed Elmore Whitehurst of Dallas, Texas, as assistant director of the administrative office. He has been a member of the Texas bar since 1934. He was admitted to practice before the United States Supreme Court in January, 1938. He is a member of the Dallas Bar Association and of the Texas State Association. He came to Washington in 1927 as secretary to Congressman Hatton Sumners, and he has been clerk to the house judiciary committee since 1932. His father, now deceased, was also a lawyer.

The assistant director is a young man of 33 years. He was born Aug. 28, 1906, in Dallas, Texas, where he attended school and graduated in 1927 from Southern Methodist University, with an A.B. degree in economics. He attended law schools in Dallas and in Washington, D. C. The administrative office will be housed in the Supreme Court building.

Full accounts of the origin and purpose of the statute creating this office were published in the JOURNAL for September, 1939, pages 737-41, and November, 1939, page 932. Great hopes are entertained for the beneficial effect of the new arrangements for promoting federal justice through the better organization and administration of the district courts.

# THE ACHIEVEMENTS OF THE AMERICAN BAR ASSOCIATION: A SIXTY YEAR RECORD\*

BY MAX RADIN

## CHAPTER IV THE UNIFORM ACTS

### *Fifty Contradictory Legal Systems*

IT may be recalled that one of the original purposes of the organization of the American Bar Association was to obviate the difficulties and confusion caused by the widely differing legal systems of the more than thirty states. Now that the states are forty-eight and not thirty-four, now that in each of ten Federal Circuits—themselves in a sense the creation of the American Bar Association—a separate law is being developed from almost autonomous courts, we should expect that the confusion then complained of would be many times worse confounded, and that the only important branch of the law for practical lawyers would be what is aptly enough termed the "Conflict of Laws." More than fifty contradictory legal systems, snarling at each other and checking each other, must create, one should suppose, a situation in which the wariest could not walk without tripping and which the wisest could not manage without constant blundering.

That this is not so, is to a large extent one of the achievements of the American Bar Association, the organized body of the lawyers of the country. And it was accomplished in the face of an opposition based on the dislike of codes and against the inertia inevitable on the part of practitioners of any art, when thoroughgoing changes are proposed in its operation.

That the law of America should be codified is an ancient demand. The principle of codification—or rather of recodification—arose in France among European countries just about the time of the American and the French revolutions, but it was produced not so much by the revolutionary impulse as by the work of the two centuries before—the seventeenth and eighteenth—the centuries of rationalism, of "natural law" and of "enlightenment." We are prone to forget that the tradition of the American Bar both in colonial times and in the early nineteenth century regarded "natural law," the law of reason, as an integral part of our jurisprudence and, as lawyers constantly said, one of the foundations of their own system. The intricacies, the irrationalities and even the absurdities of the old feudally-minded common law continually aroused efforts to reshape the substance as well as the form in some reasonable way. American courts cited the French jurists, Domat and Pothier, whose work had been mainly in the direction of recasting the Romanized civil law into a new and modern classification and of eliminating obsolete and historically determined material.

But it was, of course, the magnificent French Civil Code that more than anything else stirred the imagination of American lawyers, especially in view of the

close ties that bound us to France and, doubly so, after the revulsion created by the excesses of the French Revolution had spent itself. In the Jacksonian period, the Revolutionary idea became popular once more and exclusive reliance on an English system seemed the mark of a reactionary.

### *Codification Never Popular With Lawyers*

All this lies at the bottom of the movement which made codification one of the most discussed matters in the American law of the nineteenth century. It was a partially expressed hope in the minds of some of those who helped organize the American Bar Association that this national body would be effective in making a national law. However, just at the time that the American Bar Association was being established the memorable duel was fought between James C. Carter and David Dudley Field which resulted in the rejection of the Field Civil Code by the legislature of New York, although it was later adopted by four western states, including California. Codification had been defeated so far as the older jurisdictions were concerned.

The arguments used against codification in general are in form just as fully available against any systematic presentation of the rules of law on any topic. While statutes declaratory of the law had not been unknown, the orthodox common law doctrine about statutes, which derives from Coke, is that they are modifications—not to say, impertinent modifications—of a system that was well enough before.

A general statute on a special topic of the law, rearranging this material, clearing up its obscurities, settling its controversies, is, of course, a code, and is no less a code because it does not take within its scope the whole body of the civil law. Codification being in a sense a tabooed expression, another term was required.

That was found in "uniformity." The same persons who argued that it was against the genius of the common law to rephrase its rules in statutory form, were equally emphatic against the confusion and disturbances caused by the variety of laws in certain fields. It was particularly apparent that in commercial law it was a serious impediment to business men to find that their obligations and rights varied unpredictably as soon as they dealt across the state line.

### *"Uniformity" and "Clarification"*

There is no doubt that the fact that this same step had been taken in England not in the name of uniformity, but of clarification, helped the movement. The "Bills of Exchange Act" had been passed in 1882, and an important part of the Law Merchant was, therefore, available in a form that could be adapted or adopted in a modified form by other countries where the common law prevailed.

It is clear that merely to accept the English Act and to urge its general adoption would not serve at all. The discrepancies between general American practices—whatever their own divergencies in detail were—and

\*The first chapters of Professor Radin's study of the Association's history were published in the November number of the JOURNAL. The series will continue in succeeding numbers.

those of England were considerable. But the English Act proved that the common law doctrines in this field were capable of successful formulation. And it proved further that the objections so violently voiced were not really against codification, so much as against a "code." A certain amount of generalization was inevitable in law. Too much savored of the horrid word "theory."

It was not until the year 1889 that the American Bar Association appointed a special Committee on Uniform State Laws—a committee differing in make-up and instructions from the early and somewhat tentative committee which, we may remember, had taken so limited a view of its functions and purposes, although the formal assignment to it in 1878 was quite specific.

That Committee, called the "Committee on Commercial Law," considered not merely the question of negotiable instruments, but at the suggestion of C. C. Bonney, who was particularly active in this subject, the entire question of facilitating commercial transactions between citizens of different states. The essence of the original plan was that Congress pass a model law of negotiable paper which would govern all transactions involving interstate business. It was hoped that the individual states would follow the model thus set up.

Evidently there was a real danger that the immediate result of this would be merely to add a new set of rules necessarily at variance with all those now existing, which would be applied in matters inextricably connected with intra-state transactions. There was no certainty that the states would follow the lead of Congress. Indeed, experience had indicated the contrary.

The proposal was made to reach the matter by a constitutional amendment which would enable Congress to enact a general law of negotiable paper for the United States. This fell foul of the strong opposition to inroads on state autonomy. In fact, the same objection, i. e., that these things were state matters, was weightily raised against the entire suggestion of uniformity. This objection was made even by men who acknowledged the difficulties of the existing system, but believed they were the necessary price of a proper independence of the states.

#### *Commissioners on Uniform State Laws*

In spite of this, the movement for uniformity made rapid headway. In 1889 the Committee on Uniform State Laws was established to consider the drafting of uniform laws and to attempt in the various states to secure their adoption. An enormous impetus was given to the movement by the fact that in 1890 the Legislature of the State of New York adopted an act authorizing the appointment of "commissioners for the promotion of uniformity of legislation in the United States." The act was in a real sense to be credited to the American Bar Association, since it was urged in the legislature of New York by members of the Association and as a direct recommendation of the Association.

The action of New York was followed in other states, and in 1892 nine states sent commissioners to a National Conference on uniform legislation to meet just before the meeting of the American Bar Association at Saratoga. The Conference became a separate organization, meeting annually, but at all times closely connected with the Association itself. It was not until twenty years had elapsed that the Conference was complete. But this result was at last reached in 1912 when representatives of every state, as well as of the District of Columbia, met to consider the entire problem.

The first result was the appointing of a committee

in 1895 to draft a Negotiable Instruments act. This was reported to the Conference and adopted in 1896. It was largely based on the English Bills of Exchange Act of 1882, which had been drafted by Judge Chalmers, but the American draftsman, John J. Crawford of New York, made a number of changes, chiefly in the arrangement and disposition of the rules, and further changes were made by the Commissioners. New York passed it at once; Connecticut and Virginia almost as soon, followed by Massachusetts in 1898 and Rhode Island in 1899. By 1908, thirty-two jurisdictions had adopted it, and twenty years later it had been, with slight modifications, passed in all the states and territories, in the District of Columbia and the Canal Zone.

The history of the Conference of Commissioners of Uniform Laws is a separate thing from that of the American Bar Association. The vast extent of its operations can be seen from the briefest inspection of the program of any annual conference. Its meetings last five days. Its deliberations must be apportioned among various committees and sections. Not merely commercial law, but the law of property, the law of trusts, the law of family relations, is now being systematically studied with a view to recommending the drafting of uniform laws which are to be submitted to the separate legislatures.

But the close cooperation of the two organizations is indicated both by the fact that the meetings of the two are always held in immediate succession and that the Commissioners are for the most part actively concerned in the general work of the Association itself. The wholly unexpected success of the movement for uniform legislation is one of the major accomplishments of the American Bar Association.

#### *Much of Law Now Codified*

Whether the work of the National Conference of Commissioners will ultimately result in a complete Code of Civil Law for the entire United States cannot be determined. It is certain that much of the law—a far greater part than was dreamed of in 1889—has already been practically codified. But it still remains unlikely that a complete formulation will be attempted. The American Bar Association as well as its daughter organization retains the common lawyer's resistance to any attempt to forestall or restrict change by finality of rule.

There are no less than sixty-eight statutes which have been accepted by the Uniform Act Commissioners. Some of the fundamental topics in contract, tort, and property are not represented in any of them. But the total amount of statutory material that will be codified, if all the proposed laws are passed, is something far beyond the most sanguine expectations of 1889. With a few exceptions the Public Utilities Act, approved in 1928, the Foreign Corporations Act, approved in 1934, the Criminal Statistics Act, approved in 1937, the Composite Reports as Evidence Act, approved in 1936, the Expert Testimony Act, approved in 1937, and the amended Trustees Accounting Act, approved in 1937—all the acts that have had an opportunity of being submitted, have been enacted by at least one jurisdiction. The first of the Uniform Acts, the Negotiable Instruments Act, has been approved in all jurisdictions, fifty-three in number. Eleven additional acts have been approved in twenty or more jurisdictions and twenty-one more in ten or more jurisdictions. From the other point of view, thirty-eight jurisdictions have adopted ten or more of these acts.

This admirable and desirable result is the deserved

outcome of careful, laborious and judicious activity. It would have been comparatively easy to attempt to hasten the process and to swell the number of acts approved and enacted. But in the year 1929 a self-denying ordinance in this respect was adopted by the Conference. (Handbook of the National Conference of Commissioners on Uniform Statutes, 1936, pp. 394-396.) The first four recommendations are the most significant.

"Every act drafted by the Conference should conform to the following requirements:

"1. There should be a plainly obvious reason and demand for a uniform act on the subject.

"2. It should be practically certain that the act when prepared will be accepted by a substantial number of state legislatures.

"3. It should deal with a subject as to which the lack of uniformity will mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states.

"4. As a rule the Conference should avoid entirely novel subjects with regard to which neither legislative nor administrative experience is available."

Evidently one at least of these four recommendations and a certain number of the rest—not here quoted—are rather pious hopes than substantial guides. But from them it may be seen that the Commissioners took their tasks with a real sense of responsibility.

#### *Good Effect on Legislative Draftsmanship*

One of the incidents in the multiplication of statute law is a renewed insistence on the technique of interpreting statutes. This is a matter that has always engaged the attention of legal theorists and on which there is a respectable literature of practical textbooks. But, on the whole, in a system that has constantly declared that it did not rely on statutes for anything but inconsequential matters, we have normally contented ourselves with a few inconsistent observations taken from the cases that have built on *Heydon's Case*, 3 Co. Rep. 7.

One of the chief obstacles to any adequate study of statutory interpretation is the notorious inexperience of our legislative drafting. Evidently, if more and more of our law is to be formulated in statutory form, it behooves us to consider our words far more carefully than we have been in the habit of doing.

The Conference has had a Committee on Legislative Drafting since 1924, but, although this Committee has twice reported, it has only begun the serious consideration of this difficult problem. Certainly, if in addition to securing uniform legislation, the Conference of Commissioners, the daughter of the American Bar Association, sets itself to the task of changing our habits of legislative drafting so that the law as stated will seem less of a contorted jumble of words and more of a conscientious and meticulous statement of rules intended to be clearly understood and readily applied, both organizations will have rendered an inestimable service.

## CHAPTER V

### UNIFORM PROCEDURE

#### *Law and Procedure*

THE general public has never really known what lawyers meant by the distinction between law and procedure, or, as it is more pretentiously put, between substantive and adjective law. Laymen cannot quite



HOMER S. CUMMINGS

Former Attorney General of the United States

make out what good it is to have a right if one cannot get it, or what the difference is between being thwarted by the complete denial of any claim or by finding an irremovable obstacle in its path. And what laymen above all do not understand is why, if a right exists and is indisputable, it should be necessary to do anything more about it than assert it in unmistakable language, in order to enjoy everything claimed under it.

This feud between the public and the professional lawyer is too old and too deeply ingrained to be simply explained or readily removed. And it is very likely that nothing will convince laymen that what lawyers call procedure is anything else than an elaborate hocus pocus of a ritual which lawyers have created with the deliberate purpose of magnifying their own importance and of deriving profit from the gullibility of their fellow-citizens.

That there is a grain of truth in this notion cannot be denied. And that there are many lawyers who feel just this way about procedure and even lawyers who delight in the technicalities of procedure and who love to outdo each other in applying the tricks and subtleties of their craft without regard to justice or morals, is probably true enough. But as a matter of fact they constitute a real minority of lawyers at the present time.

The difference between the older notions of the importance of procedure and those of the present day is wide and deep. The effort to clarify and simplify procedure in all jurisdictions, whether of the common or of the civil law, was begun long ago and it has produced real results. It is impossible to say that it was initiated by lawyers, although Jeremy Bentham, to whom a great deal of the active impulse was due, was bred as a solicitor. But it is certainly the lawyers of both England and America who have most assiduously labored to change procedure from a meaningless mumbo-jumbo of

formulas to a definite and intelligible discussion of claims and counter claims.

*"The Law's Delay" As a Grievance*

There has, however, always been another and a more serious grievance nursed by laymen against the law and lawyers, and this is symbolized by the phrase "the law's delay," which has become classic in English by its presence in Hamlet's soliloquy as one of the most typical of life's miseries and one of the most potent of the impulses to suicide. The reason for the greater reaction to delay in the law than to any other sort of tension or delay is, of course, due to the strong conviction which every man has that in any controversy his claim is the just one and that every moment he is kept out of it is a wrong—an irreparable wrong—done to him. Time is really of the essence in all legal questions, not merely in those cases in which this maxim is usually applied.

At any rate, the grievance is old and bitterly resented and the need of speedy justice has always been recognized as a primary one. In the case of criminal accusations, it has been made a fundamental part of the Federal Bill of Rights as of the Bill of Rights of most of the states. But in civil actions it is very nearly as important, only it must be remembered that normally it seems more important to one of the two parties, the plaintiff, than to the other. Still, the end of a lawsuit is a relief to all sides, and the evil effects of delay are the subject of many popular stories and the theme of plays and novels. The most effective and influential of these is probably Dickens' novel of *Bleak House* in which the case of "Jarndyce and Jarndyce" became the permanent symbol of what the delays of justice may do to the litigants in any protracted lawsuit.

That complicated difficult technical procedure is one of the fruitful sources of the law's delay goes without saying. If, therefore, one of the grievances of laymen—the technical and complicated procedure—were removed or lessened, the other and stronger grievance would also be in the way of removal.

There is another matter involved in procedural reform besides the unnecessary difficulty of the procedure itself and besides the delay attendant on the complication and technicality of procedure. That is the uncertainty, which the presence of procedural pitfalls creates for the law.

Complete certainty in law is quite unobtainable. But that does not make it desirable to increase the uncertainty which law necessarily involves. And if besides the question of legal rights we also have a question of whether the proper steps have been taken in a series of thousands of such steps, we have a situation which bedevils an already unsatisfactory situation.

*Procedural Errors Still Disastrous*

A recent article by Professor Wheaton in the Cornell Law Quarterly has called attention to the commonly forgotten fact that a majority of reversals on appeal are still decided on procedural errors. It is true that in a certain number of these instances the procedural error may have been seized upon by the court to avoid deciding a difficult substantial question. But even if this is true, it merely adds another reason for procedural reform, since it is hard to see why appellate tribunals should be aided in avoiding their tasks.

A definite step forward was taken when Dean Roscoe Pound of Harvard as early as 1906 in an address to the Bar Association called attention to these defects in our administration of justice. The investigation of the matter by committees followed and the

ultimate result in method and in accomplishment paralleled the extraordinary work initiated by the Association in the matter of uniform laws.

The point of attack was first of all the practice of the Federal Courts, in which simplification was imperatively needed. The changes that successively modernized the procedure in these courts need not be detailed here. Ultimately "Canons of Procedural Reform" were presented to the Association and the first Canon read as follows:

"A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of Court, which the court may change from time to time as actual experience of their application and operation dictates."

It is this Canon that may be said to be of controlling moment. The essence of a good system of procedure is that, once certain fundamental generalities are fixed, details are left with the court. Thomas W. Shelton of Virginia made the furtherance of this idea his especial province and it received strong support from ex-President Taft when he became President of the Association. This was one of the major projects of the American Bar Association for many years. The initiative finally passed to other, and very competent hands, but the Association continued its militant support. In June, 1934, at the particular instance of Attorney-General Homer S. Cummings, an act was passed (48 U. S. Stat. at Large, 1-1064) which gave the Supreme Court power to prescribe "by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law." These rules were, however, not to abridge, enlarge nor modify the substantial rights of any litigant—a proviso far more difficult to make effective than its frequent use suggests.

*Rules of Court Triumph at Last*

The Supreme Court has exercised the powers conferred by issuing new rules of procedure and in their formulation the American Bar Association may well claim a considerable share. Perhaps the most important exercise of the power specifically conceded is the assimilation of equity and law procedure with the important qualification that the right of trial by jury guaranteed by the Seventh Amendment be not infringed. This, together with provisions dealing with expediting appeals and simplifying the law of Evidence, may be said to be the chief characteristics of the new rules, as reported by the Supreme Court to Congress in accordance with the statute.

When these rules are in full effect and have been modified—as they certainly will be—by the experience of courts in applying them and of lawyers in attempting to follow them, it will not be too much to say that the Federal Courts, which have long been the most dreaded and difficult jurisdiction to practice in for lawyers who think of procedure as a means and not an end, will have become something like a model procedural jurisdiction.

And this indicates the next step in the matter of procedural reform, a step the Association is in the act of taking. The rules of procedure—with particular emphasis on the control of details by the court, and with a rationalized and simplified code of evidence—are being presented to the various state jurisdictions in a modified form and all the efforts of the members as of the Association itself are being directed to the attempt to secure the passage of this procedural system just as was done in the case of uniform laws.

The crowded institutes on the rules held at Cleveland, Washington, New York, and other centers, under

Association auspices, demonstrated the deep interest of the bar in the working of the new rules and indicated the solid support and help of the Association in this, one of the greatest of the Association's achievements.

#### *Reasonable Uniformity of Procedure Is in Sight*

If all, or nearly all, the states have a reasonably uniform system of procedure, a fruitful sort of trouble and difficulty will be removed. The economic situation in the United States is such that almost every transaction of moment is likely to involve steps that are taken in different states. That every one of these states may require for its legal protection a wholly different type of procedure, is a serious and sometimes a distinctive interference with the right itself.

And, if procedure were uniform, one of the great difficulties in making uniform the preparation for law will be removed or be in the way of removal. What the differences in the substantive law of the states are can be readily enough learned by any trained lawyer. What the differences in practice are is generally acquired only through practical experience. It is this latter fact that has been emphasized in the objections that have been frequently raised to any attempt to get a general basis for the training of the American lawyer. Once the objection is met, effective steps in this much needed direction may be taken.

Uniformity of practice was a goal which hardly seemed feasible a generation ago. The work of the Association is an additional testimony to the effectiveness of joint effort by persons of a common profession.

## CHAPTER VI

### ADMISSION TO THE BAR

#### *Quality of Candidates for Admission*

THE American Bar Association, as we have seen, set before itself a great, and, one might say, a more or less remote objective, as well as small and immediate ones. It was quite in keeping with American traditions that the practical and immediate was not sacrificed in order to save energy for a large and fundamental idea, and that the latter was not lost sight of in the effort to secure prompt results.

The establishment of Federal Circuit Courts of Appeal was an effort to remedy an existing evil, but it was an evil which at a pinch both lawyers and citizens might have borne without disaster for an indefinite time. But there was an inherent evil in the conditions of the practice of the law which tended to vitiate every effort at improvement and which ultimately might prove the ruin of the profession itself. No profession can be better than the quality of the men who compose it. And that quality—to adapt the words of a famous Parliamentary resolution—had deteriorated, was deteriorating, and obviously needed immediate improvement.

The announcement that an organization proposes to advance its interests is generally taken to mean that they mean to advance their economic prosperity. In the case of a professional organization, the concrete and economic interests of the members are, of course, not disregarded, but it is only a facile cynicism that will assert that no other interests are concerned. In the case of the legal profession, particularly, no reasonable person can very well question that it was the public interest, far more than the economic advantage of the lawyers, which engaged and maintained the Bar Association

in its long and successful struggle to raise the quality of membership in the profession of the law.

There probably never was a time when lawyers were popular. They certainly never were in England or in the Colonies. The popular dislike of lawyers in the early history of the several states has come down to us with a wealth of incidents to illustrate it. But while lawyers were disliked, they were also respected. The one characteristic which laymen ascribed to them, even when they spoke most abusively, was their learning. Indeed, the legal profession was almost the "learned" profession, *par excellence*.

#### *Lawyers Once Drawn Only From "Upper Classes"*

This learning, to be sure, did not endear lawyers to the public. Education both in England and the United States was not wide-spread. It was in nearly all countries the prerogative of a small upper stratum. But it also constituted one of the elements which gave this upper stratum its social and economic dominance.

As long as lawyers were in the main taken from the class in which education was almost a matter of course, there might be and there was considerable discussion about the best technical training of lawyers, but there would be little danger of any considerable degradation either in attainments or in position. In England, for example, during the eighteenth and the early nineteenth centuries, the actual training of lawyers was thoroughly haphazard and unscientific, but the upper reaches of the profession were certainly manned by men of ability and learning; and the general level of the bar was high. This would continue to be the case as long as lawyers were nearly always taken from the educated portion of the community and from no other.

#### *Bar Thrown Open to All*

In the United States, on the contrary, the democratic wave of the early nineteenth century was directed against every kind of privilege, and the privilege of an educated class was included. The movement took the form first of making the legal profession the right of every citizen and, secondly,—but by no means to the same degree—of spreading an elementary education which was deemed to be amply sufficient. A learned bar seemed to be a mark of caste and an instrument of anti-democratic activity.

If this had meant merely that the lawyers of the community suffered a definite lowering of their position, the evil, while real and serious, would have been more or less localized. But under the common law system the effects were far-reaching. By a tradition which could scarcely be changed and which had been embodied in the laws of most of the states, judges were selected almost exclusively from lawyers, and judges under the common law system could not help making the law, even when they vehemently denied that they were doing so.

An ignorant bar, therefore, made an ignorant bench, and the decisions of an ignorant bench, even when in specific instances justice might well be done, were bound to make bad law, because it would be a confused and contradictory law. It was, accordingly, not merely as a means of raising the quality of legal practitioners, but of improving and clarifying the law itself, that the Bar Association addressed itself to the problem of legal education.

#### *Beginning of Movement For a Better Trained Bar*

The original instructions to the committee were limited and technical. At the very first meeting, that

of 1878, the Committee on Legal Education and Admissions to the Bar was requested to report on some plan for regulating admission to the bar, so that practitioners in one state might on reasonable conditions be admitted to practice in another. At the same time, the committee was requested to investigate admissions generally and consider how the standards in use might be made uniform.

The increase of commerce and the economic improvement of the country created a movement of goods and population, and the jealousies of an already established bar put obstacles in the way of lawyers who sought newer fields of work. The grievance indicated in the first part of the Committee's instructions, while real, was a professional one. But what at first seemed merely an incident, was the kernel of the problem. The difficulty encountered by lawyers who sought to practice in states not their own, could not be intelligently considered unless some principles of admission to the bar were established.

What were the principles generally applied in 1878 in the United States for admission to the bar? The answer may be given practically in the words of the investigating committee itself.

*Admission to Bar Claimed as a Right*

In all the states, proof of good moral character was

an essential qualification. In some, this was practically the sole qualification. In Indiana, the Constitution (Art. VII, sec 21) guaranteed to every person who was of good moral character, and who was a voter, the right to practice law. In all other states, an oral examination, generally sketchy and casual, was given. The examiners were usually judges of the Supreme Court between terms. Few questions were asked, and the reports from Maryland, West Virginia, Illinois, and Alabama, perhaps more candid than the others, indicated that the examination was no more than a formality, for only occasionally was an applicant rejected. Louisiana, Massachusetts, Nevada, New York, New Hampshire, Rhode Island, Texas, Vermont, Virginia, West Virginia, Wisconsin and the District of Columbia required, in addition, some sort of written examination, but these were hardly more thorough or better designed actually to test the fitness of the applicant. In but one of these states, New Hampshire, were there paid examiners. In Delaware and Pennsylvania, a preliminary examination in English, Latin, and Mathematics, etc., was required, and New Hampshire and Pennsylvania required that an applicant file a certificate at the time of commencing his study. A definite term of pupillage was required in many states, varying from two to four years. (California, Connecticut, Delaware, Illinois, Kansas, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, District of Columbia, namely.) However, of these, Delaware, New Jersey, New York, Oregon, Rhode Island made a one-year allowance in this matter to college graduates, and Vermont, whose period of pupillage was five years made a two and one-half year allowance. In a great number of states a law school diploma admitted the candidate to the bar without examination (Alabama, California, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, New York, Oregon, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin); but as a general thing the curricula of the schools were not sufficiently comprehensive, and in more than one instance definite frauds had been committed, students having been granted diplomas after six months' study. In many states there were no law schools at the time.

Although only the state of Indiana had no requirements except that of citizenship, this extreme example illustrates with emphasis a notion far too current at that time and still not wholly eradicated. There was, to be sure, in all the states, the requirement of good moral character. It is hardly necessary to point out that this requirement was in practice even less than perfunctory. It meant merely that the applicant had no serious criminal record. Otherwise men who had been guilty of grave moral delinquencies needed merely a few signed recommendations in order to satisfy the character demands.

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But Indiana merely put expressly a claim that was made directly and indirectly in many other places. The right to appear in the courts in one's own behalf was a fundamental right. Why was it not equally a fundamental right to appear on behalf of someone else? That was merely one aspect of it. There was another



DAVID DUDLEY FIELD

point of view which was morally far less respectable. The law was a lucrative profession. In the popular mind it was an immensely lucrative profession. As a means of livelihood, it was equated with forms of large business enterprise. Why should anyone be debarred from trying his hand at it? Skill was required in it, but so was skill required in hundreds of other crafts in all of which anyone could present himself for employment and run his chances of being successful.

The fact that Indiana was the only state in which this attitude received formal expression in the state constitution must not, I repeat, be taken to prove that it did not exist elsewhere. Any movement which sought to surround the practice of the law with conditions and difficulties had a strong popular opposition to overcome. We may note here that Indiana has recently repealed the constitutional provision in question.

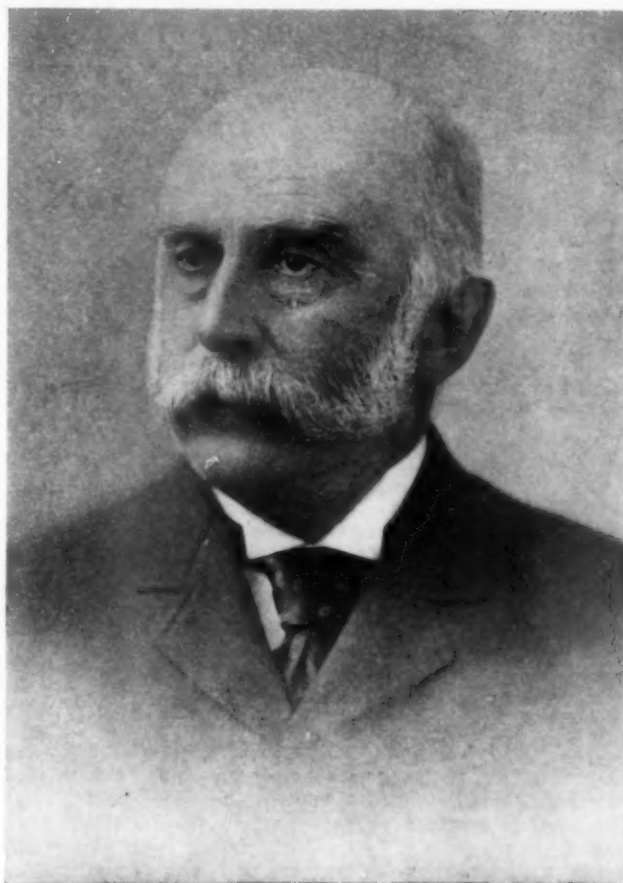
It must be remembered that those who demanded complete freedom of admission to practice regarded themselves, not as conservatives, but as progressives. It was well known that the English bar, despite the practical absence of law schools, was extremely difficult to enter, and that at the height of its importance the upper rank of the profession, the order of serjeants, was arrived at only late in life and constituted something of a monopoly. Such a situation should not be allowed in a democratic community. The Indiana doctrine was, therefore, the ideal of many persons, and if the few and slight barriers to general admission in other states were tolerated, these could be regarded as the vestiges of a condition largely outworn. The setting up of rigid standards which would exclude many applicants was not a forward movement in the eyes of many, but a retrogression.

#### *Incompetent Lawyer a Danger to the Public*

Against this, the arguments of common sense and public welfare had to be mustered by the Bar Association. The unskilled carpenter, architect, or smith was not a public menace. Almost every person employing him could quickly and decisively judge of his competence. But the incompetent lawyer was a real danger. The public had no way of distinguishing competence from incompetence here. Even in actual litigation, the errors of bad advocates were not at once apparent except to their fellow lawyers, and in the far commoner cases, in the ordinary matters of legal consultation, the mistakes of unskillful lawyers might not appear till many years after and would then be irreparable.

The example of the physician ought surely to have been conclusive. The obvious danger of quacks and the impossibility for the general public of recognizing quacks needed no strong argument to prove. Evidently to commit one's health and body to the ministrations of an incompetent physician was absurd, if it could be avoided. It was not overwhelmingly difficult to show that to run the risk of business ruin by bad legal advice or poor legal advocacy was equally absurd.

There was, to be sure, some support even in popular feeling for the movement in favor of higher standards. The tradition that the law was a profession, one of the higher types of professions, was deeply



JAMES C. CARTER

ingrained, however much it conflicted with the permanent attitude of hostility toward experts and the recent notion that freedom to practice law was somehow a natural right. Besides, property interests were becoming larger and more diversified and the influence of men of property on legislatures and on the press was much greater than that of the masses of men among whom the opposition to restriction was strongest.

We may add that the direct influence of those lawyers who were also legislators added less than might be expected to the movement. The lawyer-legislator was generally a product of the very conditions which the Association sought to change. But the chief support of the movement to raise the standards of admission was not to be found in the fact that American legislatures always contained a large number of lawyers.

*(To be continued)*

"Meantime we may well be grateful both for the college of discipline and for the college of freedom. These are great words, and each stands for an idea in education which we cannot afford to forget. Perhaps it might be well to inscribe over the gate of the college of discipline and that of the college of freedom the sentence which surmounts the Worcester Courts: 'In Obedience to the Law is Liberty'—in the first case the emphasis to be laid on one part of the sentence, and in the other case on another part."—Henry Smith Pritchett.

# A CONFESSION OF FAITH

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*Member of the Memphis, Tennessee, Bar*

## *The Junior Bar*

THE Junior Bar movement is very close to my heart. In my judgment it has by its transfusion of young blood into the state and national associations done more to restore their vitality and stimulate them than anything that has happened in several decades.

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## *The American Bar Association*

To this subject, for two reasons, I have given much thought. The first is my knowledge of, and deep and abiding interest in, the work of the Association. The other is because I have a son who is about to enter upon the practice of the law. I have been and I hope I shall continue to be chary of advice to him. However, I did subscribe for the AMERICAN BAR ASSOCIATION JOURNAL for him as soon as he entered law school. I shall also venture to advise him to join the American Bar Association as soon as he is eligible and to participate in its work and attend its meetings. I should give the same advice to any young lawyer and for the reasons I shall briefly state.

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In one of his brilliant addresses Joseph H. Choate once said that he knew no more pitiable human being than a lawyer who, when he reached the age of retirement, had no hobby to ride. Since reading this and realizing its truth I have often thought that there is no better way for a lawyer who is ready to leave the active practice to devote the garnered and ripened fruits of his experience to the welfare of his fellow man than through the machinery of the American Bar Association. As the sunset nears there is no cause

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Please do not misunderstand me. I do not mean that you should wait until the slow end of evening smiles to begin your work in the American Bar Association. Quite the contrary. I am merely adumbrating the culmination of your work in the Association—a culmination that will be impossible without a properly timed beginning.

## *Accomplishments*

But, with justifiable curiosity, you ask me: Does the American Bar Association accomplish anything really worth while? With the emphasis of understatement I reply that it does.

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back to Virginia. When they saw how beautiful was his resting place and how tenderly we had cared for it they went back to Virginia and left him in our keeping. There he is today sleeping beneath the figure of Hope that points forever to the dawn. That is my proudest recollection of the war."

In strengthening British and American friendship this was worth a score of white papers.

We endeavored in part to repay this hospitality by entertaining in Chicago in 1930 those whom the Declaration of Independence calls "our British Brethren."

No doubt to your lips rises the question: Granted that the activities of the American Bar Association are worth while, how can I participate in and benefit from them?

The remainder of my time I shall devote to answering that unasked question.

#### *The Association Is Democratic*

The American Bar Association is thoroughly democratic. In the Assembly every member has both voice and vote. So, too, in the sections. The Assembly, if it disagrees with the House of Delegates, can always require a referendum to the entire membership. Nor is there any reason why any member should not aspire to the House of Delegates. After all, membership merely means recognition by one's State bar association or the members from one's own State. Broader recognition within the circuit points to the Board of Governors.

The same democracy prevails in social affairs. There is, I think, less snobbery in the American Bar Association than in any similar organization I have ever known. Old and successful lawyers and distinguished judges rub elbows and chat with the youngest fledglings and are happy—and flattered—to have it so. You may feel lonely at the first meeting you attend. I did. It was like being a freshman at college again. I knew nobody, and certainly nobody knew me.

You will find that soon the lonely souls will begin to foregather, gradually the circle will widen, and soon you will begin to look forward to each annual meeting as a reunion of warm friends.

Just a word here about us oldsters. We should like to know you, only we don't know how. If you spy one of us in a corner of the hotel lobby talking to another gray-haired chap, don't think we're being high hat. We are not settling any weighty problems. Most likely we are envying your youth, verve, and energy and saying that we hope and believe that you will manage things better than we were able to do. You can hardly believe how you would flatter us if you came up and spoke to us.

Accept my suggestion and I'll tell you what will happen. Some day in your office you will idly glance at the telephone on your desk and the thought will come to you: "At the other end of that line, in every city and town from Miami to Seattle, from San Diego to Boston, is some warm personal friend of mine. I have only to take down the receiver to hear the cheery voice of John, Bill, or Henry and learn what he and his people are thinking or to get an accurate report on any matter in which I am interested."

#### *Friendships of Younger Lawyers*

To my mind this is one of the greatest of the imponderable values of membership in the American Bar Association. The only thing that approaches it is the friendships one makes in a great university. This does

not equal it. After college, men's paths diverge, their vocations differ, reunions become less frequent, friendships cool. As the fast flying years go by friends in the American Bar Association are drawn closer. They are practicing the same profession, facing the same problems and thinking the same thoughts. Annually they meet and tighten the bonds.

There may be some who will take issue with me as to the democracy of the Association. I have heard it charged that it is run by a small clique. This I categorically deny. The evidence usually adduced is that on the committee rosters from year to year many of the same names are found as chairmen or members. The evidence is true. The inference is incorrect. The explanation is perfectly simple.

#### *How Committees Are Named*

What happens is this. A busy and harassed president has to select his committees. His chief anxiety is the welfare of the Association and the success of his own administration. He would like to spread the work, to see new faces around the committee tables, to enlist new energies. The difficulty is that he hardly knows where to turn. His personal acquaintance is necessarily limited. He knows that certain committee members and chairmen have done good work in the past. Uncertain as to the new selections, to such members he naturally turns. Hence the repeaters. In my judgment the solution of the problem is the Junior Bar Conference. This is a proving ground for the younger members. From those who show possibilities the president can select and now does select new committee members. The results have been all that could have been desired.

Another charge sometimes made by the unthinking against the Association is that it is controlled by the great firms of the metropolitan cities. This charge is easily refuted. The first refutation is an examination of the list of the presidents of the Association. Few, indeed, have had any connection with such firms.

Under the present set-up such a thing is impossible. The nominations for officers are made by the State Delegates and usually accepted by the Association. Out of fifty-two state delegates only eight are from cities having a population in excess of 300,000. The election is by the House of Delegates. Of its membership only sixty-seven out of one hundred and seventy-seven are from cities of more than 300,000.

The policies of the Association are determined at the annual meetings by the action of the Assembly and the House of Delegates. The Assembly is the general membership. This membership is 31,735, of whom only 14,210 are from cities of more than 300,000. As already stated, out of 177 members of the House of Delegates only 67 are from cities of more than 300,000. Between meetings, the Board of Governors is the policy-determining body. Out of a membership of 16 only 8 are from cities of more than 300,000. These statistics tell their own story.<sup>1</sup>

#### *The Association's Policies Are Progressive*

It has been charged that the American Bar Association is reactionary. The record does not support this charge. On the contrary in dealing with measures

1. Out of 52 State Delegates only three are from cities having a population in excess of 500,000. Of the members of the House of Delegates only 40 out of 177 are from cities of more than 500,000. The membership of the Assembly is 31,735, of whom only 10,580 are from cities of more than 500,000. Out of the members of the Board of Governors of 16 only six are from cities of more than 500,000.

designed to promote the speedy and certain administration of justice the Association has uniformly fought on the side of the reformers.

Mention has already been made of its activity on behalf of the Rules of Civil Procedure. Despite doubts as to its constitutionality, it advocated a Federal Declaratory Judgment Act for many years before one was passed. It is strongly supporting the bill to authorize the Supreme Court to promulgate Rules of Pleading, Practice, and Procedure in Criminal Cases Prior to Verdict or Plea of Guilty.

All of the weight of its influence was behind the measures providing for the voluntary retirement of justices of the Supreme Court, for the retirement of disabled federal judges, for the intervention of the Attorney General in cases between private litigants that involve constitutional questions, and for an administrative officer for the Federal Courts.

To determine the Association's official position it is not necessary to search the record prior to the recent annual meeting in San Francisco. At that meeting the Committee on Jurisprudence and Law Reform made recommendations which President Frank J. Hogan in a letter to the members of the Association characterized as of "far reaching importance." All of these proposals received the approval of the Association. Aside from the Federal Rules of Civil Procedure, they probably constitute as advanced a code dealing with courts and the administration of justice as has been proposed in this generation. Each of these reforms was proposed by Mr. Cummings in his final report to the Congress as Attorney General.

They include: A system of public defenders in the Federal Courts, a bill requiring registration of all pistols and revolvers and of their transfer, a bill permitting suits against the United States in tort actions, a bill permitted one accused of crime to waive indictment and consent to prosecution by information, the requirement that notice of the defense of alibi be given in advance, permission to comment in criminal cases upon the defendant's failure to testify, the allowance of an appeal to the United States in criminal cases where a demurrer has been sustained to an indictment or like pleading.

From the time I have consumed you may infer that I have attempted to catalog all the ships the American Bar Association has launched. I have not. I have merely illustrated.

#### *The Authentic Voice of the Lawyers of the Country*

The past record of the Association, supplemented by the adoption of these recommendations, serves fairly to show its credo. It is not reactionary, nor is it radical. It is sanely liberal. I believe it represents the considered thought of a majority of the lawyers in the United States and is their authentic voice.

Sometimes it has been suggested that the Association is manned by dilettantes—those with whom law is an avocation and not a vocation. With this in mind, I have examined the recent annual reports of the Association. With negligible exceptions I find that the members of the Board of Governors and of the House of Delegates and the chairmen of committees are among the most active practitioners in their several communities. I venture to illustrate by naming the presidents during the present decade: Charles A. Beardsley, Frank J. Hogan, Arthur T. Vanderbilt, Frederick H. Stinchfield, William L. Ransom, Scott M. Loftin, Earle W. Evans, Clarence E. Martin, Guy A. Thompson, and Charles A. Boston. It is not open to doubt

that each of these men was among the active leaders of the bar in his community.

#### *A Confession of Faith*

Is there any conclusion to be drawn from what I have said? I think there is. This is a confession of faith. I believe that the American Bar Association is unselfishly motivated and admirably implemented to work for constructive and worthwhile legislation, especially that dealing with the administration of justice. I believe that it is controlled by no group or interest, but by the American lawyers. I believe that it is thoroughly democratic and responsive to the will of its members, the great majority of whom are the lawyers in the smaller cities and towns. I believe that in it lawyers from villages, towns, and cities meet on equal terms and are rated only according to character and capacity. I believe that it promotes national and international good will. I believe that it is progressive and not reactionary. I believe that its annual meetings furnish the best opportunity for congenial pleasure and the making of enduring friendships that can come to a lawyer. I believe that it is susceptible of improvement, but that improvements are being made and will be made as rapidly as their value can be assessed. I believe that while now it includes approximately 32,000 of the 175,000 American lawyers, the time will come when it will include at least 90 per cent of the active lawyers who are eligible, and when those who are not members will feel called upon to apologize for the absence of their names.

In short I earnestly believe that the American Bar Association is and will increasingly become the most effective instrument that has ever been fashioned for unselfishly promoting in judicial and legislative fields the general welfare of the American people. The lawyer who neglects to enlist for the duration of the war is neglecting his best chance for public service.

#### KANSAS LEGAL INSTITUTE

The Kansas State Bar Association is sponsoring a program of "courses designed for the practicing lawyer." A wide variety of topics is offered. The service is for all lawyers of the State, whether Association members or not. Actual conduct of the institute rests with the district, county, and local bar organizations, who make all arrangements. A typical program will run about as follows: Meeting convenes at 3 P. M.; discussion by first speaker (45 mins.), followed by round-table; recess at 5; informal get-together where visitors and local lawyers may become better acquainted; dinner at 6; after dinner, 15 mins. for bar association business; then discussion by second speaker (45 mins.), followed by adjournment at 9. It is hoped that courts in the area will adjourn on Institute Day to permit attendance by all judges and lawyers of the district.

John H. Hunt, Topeka, is chairman of the general committee in charge.

"Through these men's valor the smoke of the burning of wide-floored Tegea went not up to heaven, who chose to leave the city glad and free to their children, and themselves to die in forefront of the battle." (Simonides on the defenders of Tegea.)

## SELECTED ESSAYS SUBMITTED IN 1939 ROSS ESSAY CONTEST: A SYMPOSIUM

SUBJECT: "TO WHAT EXTENT SHOULD THE DECISIONS OF  
ADMINISTRATIVE BODIES BE REVIEWABLE BY THE COURTS?"

### VI. ESSAY SUBMITTED BY MR. JOHN L. SEYMOUR\*

#### *The Judge's Breakfast*

JUDGE BOHNER'S toast had been soft; his boiled eggs had been one-half minute too hard; his marmalade had been made from oranges that were hardly past being green; and his cook had allowed the coffee to boil. This combination of calamities, occurring not singly but all at once, had produced in the soul of the judge a bitterness not well calculated to sweeten the administration of justice. Judge Bohner was not a wealthy dilettante-at-law, but a hard-working member of the bar with sufficient legal knowledge and superior political acumen. He had a sincere interest in the delights of philosophy and the vagaries of human nature, so he generally heard his cases tolerantly, but neither his tolerance nor all the philosophies of the ancients could overcome the effect of such a breakfast.

He began his day by opening court five minutes early, appearing noiselessly and addressing the still seated members of the bar from the bench:

"Well, well, good morning, gentlemen. It used to be the custom for counsel to rise at the entry of the court. But times change and men with them, so we shall conform to the new custom."

Whereupon as the functionary began his chant and the lawyers sprang to their feet, he sat, so timing his sitting that they rose to a seated judge. Some of counsel whose cases depended more upon the kindness of the court than the justice of the cause showed the beginnings of active distress, while some who expected a speedy application of the divine dispensation called justice showed an apostate's loss of faith in the efficacy of their prayers.

#### *Public Utility Appeal—Piracy (Robbery on the Water)*

"The first case," said the court, as he poured himself a glass of water from a thermos jug and spread a packet of pills out before him, "is *Borough of Ridley Heights vs. Ware County Water Company*, a typical utility commission case. It has been pending for eleven years. This is its fourth appeal. The grounds of the appeal are so like those of the three which preceded it that at the moment I am unable to distinguish them. The plaintiff maintains in effect that the defendant has

been guilty of piracy (robbery on the water), while the defendant replies that the newly established water rates are confiscatory. Whether the new rates are confiscatory could easily be ascertained, in view of the lapse of time, except for the fact that the original rates are still being collected. I have asked counsel to explain the cause of this eleven year delay and, from their completely futile answers, have concluded that the principles of appeal have been forgotten by them or, more probably, were never known.

"This case was brought to the Chancery court not as an appeal but as a bill in equity by the water company against the public service commission, seeking a restraining order to prevent the application of the new rates. Being such, it differed in form from anything which is termed an appeal in the regular courts. In the broad sense of the word, however, it is an appeal. It is an appeal to the regular courts from the action of an administrative tribunal. In our consideration of the cases we will treat judicial consideration of any case that has been decided by an administrative body as an appeal.

"Counselor for the Borough challenges the right of the plaintiff to block the orders of the Public Utilities Commission by bringing this appealing bill in equity. Should the decision of the administrative body be final? Should the administeree be able to block the decrees of the minister by resorting to all the tortuous devices and methods of delay known to the practice of law? Is appeal a right? Or is it a permission that ought not to be granted in administrative cases, or which ought to be allowed only rarely? To determine these questions it is necessary to inquire whether the decisions and orders of Public Utilities Commissions, or of other administrative bodies, so differ from the functions of regular courts that different principles ought to apply to them. This we shall do so far as possible briefly, with an absence of iteration, whatever that may be, and without undue prolixity, we hope.

#### *Principles of Review of Administrative Decisions*

"We shall begin our discussion with a syllabus of our thoughts upon this matter, so that counsel who are living in the vain hope of having a hearing today may retire and spend their time in more fruitful occupations. Stenographer, take down a title: Syllabus by the Court.

(1) It is impossible to distinguish between the acts performed by certain administrative bodies and the acts performed by certain courts of first instance.

(2) Administrative bodies in the United States are judicial, or quasi-judicial, in character.

(3) The causes of appeal are the same from administrative bodies as from courts.

\*EDITOR'S NOTE: As announced in the June issue of the Journal, we publish herewith one of the essays submitted in the Erskine M. Ross Essay Competition—an essay which was not awarded the prize but is deemed to be of a high standard of excellence and effectiveness. In publishing several essays in addition to the winning essay (which was in our June issue), no attempt has been made to select or rate the others in any order of relative merit. They have been selected for the reason that they are deemed worthy of inclusion in a symposium representative of varying views on the subject. The author of the essay published in this issue is Mr. John L. Seymour, a member of the Bars of Pennsylvania and the District of Columbia.

(4) There is only one reason for appeal: the frailty of man, but that reason has many divisions.

(5) Appeal from any judging body to the courts is not an Olympian condescension, but a basic human right.

(6) In forming our government we have not wholly separated the judicial from the executive branch of the government. In some administrative bodies these functions are combined.

(7) Appeal from the decision of administrative bodies to the courts is essential to the preservation of democratic government.

(8) The regular courts must be protected from a flood of appeals involving only minor questions, or brought for mere purposes of delay.

(9) The administrative body of first instance should be empowered and constructed to do complete justice in every case rightly before it.

(10) Courts should be protected against a flood of appeals not by dividing subject matter into things appealable or not, but functionally.

(11) An appellate administrative body should be set up to hear all appeals from decisions of administrative bodies of first instance.

(12) Appeal from the appellate administrative body should be to a court of appellate jurisdiction and should be final in all but the rarest cases.

(13) In rare cases appeal should be permitted from the appellate court to the Supreme Court of the United States on writ of certiorari.

#### *Do Courts and Administrative Bodies Act Differently?*

"The number of administrative tribunals is, if not legion, at least cohort. Wigmore, XXV A.B.A. JOURNAL, 26, named twenty-eight of them without trying. Each of those tribunals has a different procedure. To deduce the fundamental principles of appeal and the limitations that ought to be applied to the right of appeal from a study of their various procedures would require a work of cyclopedic proportions, not an essay. Consequently, we must woo Minerva with generalities and nice comparisons so as to approach the regions of truth without treading the tortuous mazes of specific instance. The first question before us is whether it is possible to distinguish between the acts performed by administrative bodies in fulfilling their functions, and the acts performed by the regular courts.

"Firstly, we do not call administrative bodies courts, and we do not pay their people as judges. These differences, though obvious, are superficial. The name by which we call a tribunal is superficial because to call a rose *spathyma foetida* L.Raf. does not make it smell like that noisome plant, and likewise, if a body is a court, it is so because of its functions, not its name. Also, to call a judge an examiner, or an inquisitor, does not make him the less a judge if his duties are judicial. We must seek elsewhere for a true distinction. This difference does appear: The administrative tribunals are generally in the executive branch of the government, and the courts are in the judicial branch of the government. However, that is a matter of location, not of quality. A judicial body does not become otherwise merely because it is located in an executive place, but an executive can become a judge if he is given, or acquires, the power to act judicially.

"Many of the cases decided by the administrative bodies are *ex parte*, but that is a most doubtful distinction both because there is expensive (Stenographer, I said expensive) *inter partes* litigation before some of the administrative tribunals, such as interferences



JOHN L. SEYMOUR

in the Patent Office, and because *ex parte* cases come before the courts, as in the administration of estates. Furthermore, *ex parte* cases become *inter partes* upon appeal, the applicant being one party and the body whose decision is challenged being the other. We must conclude that it is impossible to make a satisfactory distinction in this way.

"Now, there is this notable fact, that in some cases of administrative bodies the body itself initiates the action, which is but seldom true in the courts. However, that concerns the beginning of the action, not its end, and since the decision comes at the end, not at the beginning, it begs the question.

#### *Their Functions Are the Same*

"Since our attempt to distinguish between courts and administrative bodies on a basis of functions performed is a failure, let us examine the question, not by reference to the multitudinous decisions of different bodies, not by further pursuing an unprofitable line of inquiry, but by defining a judicial body and comparing our tribunals to our definition."

At this point the court looked distressed, took a pill, drank some water, and glared around, as though daring anyone to take himself off to the more fruitful occupation which he had just mentioned. Discretion being present, no one had cared to be absent and the court continued:

"Any body is judicial which operates by authority of law to make findings of fact, to draw conclusions of law, to make decrees in accordance with its findings, and to enforce the decrees. That the courts do this is obvious.

"Many administrative bodies also act with authority of law to find facts, apply the law thereto, and enforce their findings; they answer our definition of a

judicial body and must be considered as such. Since they are judicial, and even the courts have conceded that they are quasi-judicial, we ought to admit that they are quite as much subject to the general principles of appeal as are the regular courts, and that we will be doing substantial justice by applying those principles to them."

At this moment the court had hasty resort to pills and water, gazed from a window upon the soft spring skies without, and returned to his lecture with an expression that foretold a taste of winter within.

*Basis of Appeal from Findings of Law and Fact*

"Appeals," he announced, "whether they be from the action of a court or an administrative body, and regardless of whether they ought to be carried in the same way, arise from the same cause. In the further consideration of this point let us lump all judicial tribunals in the copious container styled: the Judge. Counsel believe that they appeal for a variety of reasons, yet analyze all the grounds of appeal and you find that all the causes are one. Counsel will tell you that the one cause is the judge. The judge, they say, has made an error of fact; or the judge has made a mistake of law. In so doing counsel flatter themselves because errors of fact arise from the presentation of incomplete evidence, which may arise through the inability of counsel to find or present all the facts, or through the negligence and fault of counsel; or they arise from the presentation of false evidence, with or without the knowledge of counsel; and only in the case where a mistake of evidence is made by the court, is the court itself at fault.

"The errors that arise from mistake of law ought to have only two branches: (1) misapplication of the law from failure to apply the law correctly, or failure to apply the correct law, or from ignorance, or from failure to inform itself, or from adoption of a wrong view; and (2) from the application of principles of law which, although applied according to the cases, are founded in ancient error. Those are the bases of permissible error in judicial principle, but our procedure is such that we have two other sources equally fruitful: (3) the Laws of the Medes and the Persians, called the Rules of Evidence, the violation of one jot or tittle of which is fatal; and (4) the inflexible Code of Hammurabi, otherwise called Canons of Pleading and Procedure. The Supreme Court has struck at the canons of procedure in the new rules, and great should be the benefit therefrom in Federal practice, but Stygian darkness yet dwells in many a Cimmerian jurisdiction.

"Counsel also aid in producing errors of law by presenting the wrong law, the incomplete law, by misinterpreting the law, and by confusing the issue.

"In the misapplication of law and in the application of law founded in ancient error the administrators are as prone to err as the judges. However, it is to be said in high praise of the administrative tribunals that their simpler procedure, and general disregard of the rules of evidence (although some of them pay lip service to the rules), greatly reduce the number of appeals on synthetic grounds 3 and 4.

"To the account of the judge, counsel also lays the small matter of unjust decision." We like to think that our executives are virtuous; that our legislators act always in the public interest; that our judges are just. However, we know that such things have not always been so among other nations; we have observed, in other countries that becoming a judge has not always produced the overturn of character which is necessary

to make a liberal out of a man of prejudice; to make a politician abandon the political associates who raised him to the dignity of the coil; or to make a covetous man forget his greed. The injustice of the judges of foreign lands may arise from prejudice, from private misinformation, from political influence, from economic persuasion, from temporary or old malice, or from that subtlest enemy of right reason, expediency. And so, lest something like that raise its Gorgon head in our land to corrupt our courts, we ought to have a right of appeal handy. To do otherwise would be to give free rein to all that is imperfect in the judge's character.

"Things are. There is neither truth nor falsity in them. Truth is the conformity of the mind with existing fact. Error is the mind's belief contrary to existing fact. Error is of the mind, and the mind is of man.

*Man (Whether Administrator or Judge) is Fallible*

"We have said that the many sources of error and of appeal are one. That one is man, not as counsel, nor the particular men called judges, but man the Creature whose infirmity shows in mistake, or malice, or failure. To protect the people from that infirmity, one must subject the judgment of the men called judges to review by men capable, learned and, so far as possible, honest.

"The men who sit as judges in administrative tribunals are no less men and no less liable to err than are the men who sit as judges in the regular courts. We have already seen that there is little distinction between the judging which is done by the administrative tribunal and that which is done by the regular court. The sources from which administrative tribunals, as well as other courts, reach wrong conclusions are so numerous that appeal from any judicial tribunal is not an Olympian condescension of government, but a basic human right. The right of appeal is essential to the administration of justice, regardless of whether that justice is to be administered by a man called a judge or by a man called an administrator. We conclude that there is equal reason for the existence of an appeal procedure in connection with all such tribunals."

At this point great distress showed upon the face of the court, who lost his breath, clasped his hands across his stomach, and after a moment of silence that was doubtless as painful to counsel as it seemed to be to him, made a sudden raid upon the pills and water. Whether their effect was psychological or physiological cannot be accurately stated, but after a moment he relaxed, counsel relaxed, the stenographer seemed to feel much better, and he continued.

"One of the noblest conceptions of man," he said, "is an invention which has benefited the human race beyond measure: It is Montesquieu's separation of the section of the government which interprets the laws (the judicial branch) from the section of the government which enforces them (the executive branch). He wrote: (Spirit of Laws, XI-6)

"In every government there are three sorts of power: the legislative power; the executive power in respect to things dependent on the law of nations; and the executive power in regard to matters that depend on the civil law.

"By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals."

#### *Separation of Governmental Powers Not Strictly Preserved*

"A discreet consideration of our present tendency in government indicates that that principle of separation has not been well remembered, and that in setting up new departments of government the judicial has been confused once more with the executive. For example, the patent examiner who decides on the patentability of an invention, performs the identical function that is performed by the court to which the case is carried under R.S. 4915. Is the question considered on appeal from a tax board any different from that considered by the tax examiner? When, as is now too frequently the case, you cannot distinguish between the acts which are performed by an executive department, and the acts performed by the courts, you have ample evidence of a confusion which is not only threatening us, but is on us in full force.

"As we have hereinabove indicated, the principles of Montesquieu have not been too well followed in the setting up of some governmental departments. Our political parties have made the name "bureaucracy" well known. According to those gentlemen a bureaucracy is what the other side will saddle on the people if it wins the next election. According to the dictionary a bureaucracy is a government by bureaus, to which there should be no objection, if the administration of the bureaus is good, since 'whate'er is best administer'd is best'.\* Innocuous definitions aside, in American political philosophy a bureaucracy is a governmental administrative agency which is uncontrolled from without; it is an administrative body which administers the law according to its own interpretation thereof. We have not well separated the executive from the judicial in setting up our bureaus, and have shown some tendency to confuse the executive and legislative. If our bureaus and offices can interpret the law, and they can, and if they can enforce it according to their own interpretation, which they do, they are in a position to tyrannize the people by the gradual accretion of power, unless their decisions are subject to review by the courts. Hence, judicial review of the acts of administrative bodies is essential to the preservation of our form of democratic government."

The court suddenly stopped and clapped a hand to his mouth; counsel, who had been but sleepily listening, came to attention expecting the nubbin and grand finale of the lecture; the stenographer looked up from her scribbling in surprise; and the Judge, not to disappoint them, hiccupped. He thought it over for a minute, brightened doubtfully, and continued.

\*Pope, "Essay on Man."

"The most vicious of reasons for appeal is to delay the judgment. That is a matter which is fostered by our present rules. It is the shame of our legal system, a form of open and approved malpractice. The number of reviews and of appeals that can be taken foster it. The legal principle of favoring the possessor fosters it. There is not an old, inefficient, complex, outmoded part of our jurisprudence that does not foster it.

"The case before us, which has been delayed eleven years, is by no means unique. Instances are recorded of prosecutions that have been pending for several lifetimes. I shall not attempt to solve in the next five minutes a type of malpractice that has puzzled the best minds of the law for centuries (not that they tried to do anything about it), but I shall say that our present practice of delaying execution pending appeal can be improved. In many cases better justice would be done by giving immediate execution to the order of the lower tribunal, or at least by taking the controversial property out of the loser's hands.

#### *Judicial Review Has Its Limits*

"To say that there shall be the right of appeal from the decisions of administrative tribunals," he continued, "is not to say that the regular courts shall be flooded with all the minor controversies between counsel and agency or even with all the major questions which need review. One thing is certain: Enormous complexity of rate making, of tax matters, and of some patent affairs is such that the mind of one human, whether court or commissioner, is bound occasionally to fail before it. And fail they do, and corrected they must be. Furthermore, controversies arise between counsel and official which cannot be resolved by the parties in the heat of the moment, the pride of opinion, or the sincerity of different interpretations. It would be imposing a great and unfair burden upon the courts to require them to examine the minutiae of all such controversies. The courts are not usually technically trained. Such questions are very frequently highly technical and for a court to review such matters requires instructing the judges in the fundamentals of a particular field, the course of its development over the years, and the position therein of the particular controversy. This is a labor which is not only unnecessary, but fraught with the danger of additional error.

"The question of how to protect the courts is a difficult one. It would first occur to one to divide matters into those appealable and those not appealable. For instance, it could be established that questions of fact could not be appealed on the theory that the experts of the administrative body were in a far better position to judge the facts involved than any judge not a regular practitioner of the mysteries. It might also be decided that only questions of fundamental law would be appealable to the courts, but that would be a most dangerous distinction which would leave it to be decided by somebody what questions of law were fundamental. Distinctions might also be made on procedural grounds, mere matters of procedure being decided by the administrative body without appeal. However, even a seemingly minor question may be the difference between justice and great injustice. What is minor and what is major in questions of law, or anything else, has been disputed by the philosophers since the earliest times. We must see to it that the matter of procedure is not seized upon by an official to defeat the intention of the statute. I conclude from this that to limit appeal by dividing questions into classes ap-

pealable and classes not appealable is a most dangerous and a most unsatisfactory method.

#### *Special Appellate Body Should Be Set Up*

"It is much more satisfactory to limit appeals functionally rather than by classification. A great many appeals involve no major points of law or of fact but are concerned with some minor controversy, mainly involving a mere difference of opinion, which is doubtless important to the particular case. Such appeals need only the arbitration of an unprejudiced tribunal to be terminated.

"Questions of procedure are sometimes also of importance to the progress of a particular matter but of no general interest. In these cases also the intervention of some skilled, disinterested body is all that is necessary to terminate the controversy. By grouping all such minor controversies together, we find that they constitute the majority of all appeals from the actions of administrative tribunals. To dispose of such matters there should be set up an appellate body composed of experts selected from the learned and experienced officials of the administrative tribunal.

"In general the board of appeals so established should be selected from the experts of the particular bureau. It should not be an interdepartment or inter-bureau board of appeals. Nothing more futile can possibly be imagined than to submit an intricate problem of taxation to a board composed of a patent expert, an interstate commerce commissioner, and a tax man. It would either follow that the tax man's ideas would prevail in spite of right or reason or that a most inexpert and amateurish decision would be forthcoming from the other members of the board. Conversely, patent counsel in pleading some intricate case of patent law or technical fact ought to be heard by skilled people, not by inexpert judges selected from different bureaus. This applies with equal force to every administrative tribunal. The very basis of success in administrative tribunals is this: not that the administrator is less a judge than another, but that the administrator is a judge of whom great learning is required in only one field of the law. It is a matter of efficiency to have first consideration and the first appeal heard by experts in the field. There is no reason of protection or of efficiency or of expense which can warrant or justify the destroying of the appellate board's efficiency by composing it of members who are not trained. The ultimate aim of the tribunal and its board of appeals is to eliminate technical error so that the court of appeals may judge the matter, so far as possible, as a question of pure law. To do otherwise is to substitute appellate ignorance for the intimate appellate knowledge which is absolutely essential.

#### *Experience of Patent Office*

"The Patent Office is an administrative agency of long standing and great experience. Its personnel is learned in its field and of high character. Its practice in appeals from the action of the administrator has been modified in the forge room of experience and in its first step furnishes a model for other administrative bodies. In the Patent Office the first appeal is to the Board of Appeals, a body composed of three examiners of long experience and high ability, who are chosen from the examining corps on a basis of knowledge and experience. The appeals are carried to them at a minimum of expense and, generally speaking, have been decided with reasonable promptitude. So efficient has this board proved itself to be that only a few cases

are ever carried on appeal from their judgments to the regular courts, and when carried they are sustained with great frequency. The decisions of the Board are good, their knowledge of the subject is greater than that which is possessed by most courts, and the learning of the members in the field of patent law is exemplary. Their decisions restrain the decisions and direct the practice of the examining corps; establish rules of administrative patent law; eliminate all but a few appeals if not with satisfaction, at least with substantial justice to the appellant; and simplify the consideration of further appeals by the courts. From the great success which this tribunal has enjoyed, and from the success which the Board of Tax Appeals has enjoyed, it is beyond doubt that the creation of similar boards of appeals within the majority of administrative tribunals would be attended with equally beneficial results.

"On procedural controversies the Patent Office does not permit appeal to the Board of Appeals but refers all such matters in the guise of a petition to the Commissioner for a decision and his decision is deemed final. This spares the Board of Appeals the consideration of a lot of minor points which would otherwise handicap it and has something to recommend it in speed. However, it is not nearly so satisfactory in operation as the procedure before the Board of Appeals, and furnishes us with further reason to say that the mixture of functional and class protection, which it exemplifies, is better than class protection alone but not the equal of straight functional protection. It is true that only questions of pure form are so decided, all matters of merit going by appeal to the Board of Appeals, but in other tribunals it will not be so easy to distinguish between form and substance; so for our general practice we should advise the adoption of straight appeal to our Board on all questions.

#### *Court of Appeals Should Review Decision of Board of Administrative Appeals*

"Appeal from the decision of the Board of Appeals of an administrative body should be carried directly to a court of appellate rank, not to a district court. All the fact-finding and law-applying which a district court would accomplish ought to be done by the administrative bodies, so that there would be no need for the interposition of a court of first instance. The practice of the Patent Office is less than perfect in this respect: There are two remedies from the action of the Patent Office Board of Appeals: The first is by appeal to the Court of Customs and Patent Appeals, which receives no evidence, considers no new points, upholds or reverses on the strict basis of the record. That court rarely disagrees with the tribunals of the Patent Office on any question of fact, apparently on the justifiable theory that the technical knowledge of the tribunals of the Patent Office is superior to its own. Nevertheless, the Patent Office has no machinery for taking testimony, does not receive testimony in *ex parte* cases and regards even affidavits with suspicion, so that if an appeal depends upon the demonstration of technical effects, or upon proving certain allegations of fact, the applicant is under a handicap before the Office, the Board and the Court of Customs and Patent Appeals.

"This handicap can be overcome by bringing a bill in equity against the Commissioner of Patents in the District Court of the United States. This proceeding is considered as an original bill and proceeds as any other trial in equity would proceed, with this exception that, while the applicant can bring in witnesses to prove

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# THE LINEAGE OF SOME PROCEDURAL WORDS

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ONE to whom words are merely arbitrary counters of speech—symbols of present meaning and nothing more—can scarcely have felt any thrill when, in a former decade, he came upon Archbishop Trench's "Study of Words" or his "English, Past and Present." No more can he have found any intellectual excitement in the word-books of more recent appearance, such as the captivating volumes of Ernest Weekley. But for others, to whom the word is a thing of many facets, reflecting the gleams of its history and bearing the impress of the changing social environment in which it was coined, through which it has lived and by which it has been modified and often transformed in meaning, there can be no more fascinating pursuit than its study. And what is true of words used in the speech and writing of daily life is no less true of the technical terms of the legal profession. For, unlike the professional vocabulary of medicine, for example, whose largely evident newness corresponds to the comparatively late development of that science, the lawyer's terms, for the most part, have come down from a remote past. In this regard, indeed, the lawyer stands on a singularly favored footing, for the origin of his terms is so often bound up with the understanding of the thing denoted that his education in the law has again and again involved a consideration of these origins.

## "Procedure," "Process"

The terms that we employ in the field of procedure are here of striking interest. The word *procedure*, itself, long stopped at the threshold of our legal vocabulary, before making its definite entrance. A transplant of the French *procédure*, it was good English at least as early as the seventeenth century,<sup>1</sup> but not until the nineteenth did it enter into general use by the profession, which before had been content with the trichotomy, "pleading, practice and evidence." Its transition to the technical vocabulary was undoubtedly due to the influence proceeding from the writings of Jeremy Bentham. The first statutory application of the term appears to have been American, in the title of the New York "Code of Procedure" of 1848, but four years later it came to like recognition in the title of the first English "Common Law Procedure Act," that of 1852. The original French term *procédure*, which is still the modern one, is derived from the Latin *procedere*, but the Romans had no substantive from this root to designate either the system of proceeding or the proceeding itself. The term *ordo iudiciorum* served to denote the order or sequence of causes coming on for attention, and in later times, "we not seldom find *ordo iudiciorum* used in a more general sense as a collective designation of the instituted courts and their mode of proceeding."<sup>2</sup> For centuries the expression *ordo iudiciorum privatorum* has been used by writers on Roman law to distinguish the ordinary civil procedure of the classical period from the extraordinary, but this use, while entirely justified, does not specifically appear in

the Roman sources.<sup>3</sup> Apart, however, from these considerations, the Roman legal vocabulary at no time possessed any word corresponding to "procedure." A Latin substantive from *procedere* first appeared as a legal expression in the Middle Ages when the canonical jurists began to use *processus iudicii* and *processus iudiciarius* or *processus* alone to denote either the system of proceeding or the proceedings in a particular cause.<sup>4</sup> This term survives in the modern languages, but not with complete uniformity of meaning. Thus the German *Prozess* and the Swedish, Danish and Norwegian *proces* are used to denote the system, although frequently compounded with the word for "law" (*Prozessrecht*, *procesrätt*, *procesret*), but are also employed to signify the proceedings in a given cause. In Italian, *procedura*, formed from *procédure* with the entrance of the French law under Napoleon, is used for the system, but *processo* is used with both meanings. The tendency, however, is to reject *procedura* as a Gallicism and to substitute the more scientific *diritto processuale* = "processual law."<sup>5</sup> The Spanish *proceso* is generally applied to the individual cause, while other terms, *procedimiento*, *enjuiciamiento* or, by a borrowing from the Italian writers, *derecho procesal*, serve to denote the system. In the Scots law, the old-fashioned "forms of process," as betokening the mode of proceeding, has given way to "practice" or "procedure," but "process" remains in established usage as designating, on the one hand, the collective papers and orders of a given suit, or on the other, the individual suit itself. Quite different has been the fortune of the mediaeval *processus* in its adaptation to our own legal vocabulary. We do not ordinarily use the word *process* as a precise synonym of "procedure" or to designate the individual cause, nor, at the present day, does it ever occur in any sense approaching that of "record." With us the word in its more technical usage, as denoting the writs issued by a court in the course of the cause, has a much narrower meaning than that obtaining elsewhere, but, on the other hand, when we speak of "due process of law"—as we have done since the 1300s, if not before<sup>6</sup>—or refer to the "judicial process," we are using the term in a wider and more abstract sense than do generally any of the other legal vocabularies.

3. Wenger, *Institutionen des römischen Zivilprozessrechts* (1925) 27 n. 21; 2 Wlassak, *Römische Prozessgesetze* (1888) 11; 2 Bethmann-Hollweg *Der Zivilprozess des gemeinen Rechts in geschichtlicher Entwicklung* (1865) 189.

4. Rosenberg, *Lehrbuch des deutschen Zivilprozessrechts* (1929) 1; Wach, *Handbuch des deutschen Zivilprozessrechts* (1885) 3, n. 1; Renaud, *Lehrbuch des gemeinen deutschen Zivilprozessrechts* (1873) 1 n. 1.

5. Chiovenda, *Principii di diritto processuale civile* (3d ed. 1923) 26 n. 1.

6. Stat. 28 Edw. III, c. 3 (anno 1354); process of law (*processe de ley*) appears in 1350 or 1351 in a petition of the Commons and its grant by the King (2 Rot. Parl. 228); McGehee, *Due Process of Law* (1906) 1 n. 2, 9. But the expression "due process" unquestionably antedates both these instances. Thus in Y. B. 12 & 13 Edward III (Rolls Series) 100, we find counsel, in 1339, saying: "It is ordained by statute that the King never ought to record except by due process (*due processe*), and this record is not by due process but upon suggestion."

1. See the instances in Oxford English Dictionary, *s. v. Procedure*. (In subsequent footnotes this work is cited by the accented abbreviation, O. E. D.)

2. Hartmann-Ubbelohde, *Ordo iudiciorum* (1886) 544.

### "Court"

It seems something less than obvious to associate *court* in the sense of a judicial tribunal with the same word in the sense of an enclosed space. Yet the two senses were originally one. For the judicial tribunal acquired this name from the fact that it sat in an enclosure. The association points to a time when judicial business was transacted in the open air. We know that the judicial assemblies of the Germanic peoples were anciently thus held, on hills, in valleys or groves or other places, deemed from time immemorial to be holy ground.<sup>7</sup> Later some species of sheltered enclosure came to be the rule,<sup>8</sup> and in the cities it was an enclosed space, within the market-place, roofed over but otherwise open, that usually served for the administration of justice. Such was the case until the advent of court-houses introduced a feature long before appearing in the Roman *basilica*. The word *court* comes from the same word in Old French (the later and modern French form is *cour*), which derived it from the Latin *cohors*, through the Popular Latin *cortis*, *cortem*. *Cohors*, *cohortem* (our "cohort") is the familiar word signifying a military group. But this at the outset was in the sense of a "multitude enclosed,"<sup>9</sup> for *cohors* primarily meant an enclosure. Says Professor Weekley, "Latin had . . . related to *hortus*, the compound *cohors*, *cohortem*, a poultry-yard, cattle-pen. It was characteristic of the Romans, originally a small rustic community, to use simple farming metaphor in their military organization."<sup>10</sup> So that the Latin word, as represented by *cortis* and then "court," was thus endowed with its primitive sense of "enclosure" in a new application. The same idea of enclosure accounts for the use of "court" in relation to the residence of the ruler: the royal court was originally but the enclosed premises of the king. We cannot, however, agree with the author just cited when he says that "as it was at the ruler's residence that justice was administered, the development of the judicial sense of *cour* was inevitable."<sup>11</sup> Among the Germanic stocks, popular and local justice long preceded the justice of the king. Every student of English legal history knows that it was only by degrees that the royal justice came to supersede the justice of the popular and baronial courts. Under different conditions the same thing was true in France and Germany.<sup>12</sup> Control over these local judicatures to a greater or less extent the ruler might have through his officers, but administration of justice by the ruler at his residence or elsewhere assuredly did not give us the legal sense of "court." We venture to think, rather, that the two senses of the word had an independent development, growing out of the same fact of enclosure.

Etymologically the word *curia* does not appear to have any connection with "court."<sup>13</sup> It is interesting to notice, however, that its evolution presents some points of resemblance. Originally denoting a Roman political subdivision somewhat akin to our city ward, it came to mean the hall wherein met the members of

this subdivision, and later the meeting-place of the Roman Senate. On the precedent of the latter usage, the term in the Middle Ages was made to apply to the place where a council or similar body assembled and then to the body itself, as in the familiar instance of the *Curia Regis*.<sup>14</sup> Resultingly it acquired in Anglo-Latin, as in Mediaeval Latin generally, the full meaning of "judicial tribunal," as exemplified in our expressions *per curiam* and *curia advisari vult*.

### "Action," "Suit," "Cause"

*Action* is the Latin *actio*, from *ago*, to act. *Agere lege* meant to act by virtue of the statute law, and this acting, that is to say, the proceeding at law, was known as *actio*. Later, when praetorian law came into being, the same designation was applied to the relative proceeding. The word retained its meaning in Popular Latin and with this meaning was bequeathed to the Romance languages (Fr. *action*, Ital. *azione*, Sp. *acción*, Port. *acção*, Roum. *acțiune*) as well as through French to English. *Suit* is of a different character. Its source is the Latin *sequi*, "to follow," "to pursue," but it comes to us through an Old French derivative, appearing as *sieutte*, *suitte* and in other similar forms, from a probable Popular Latin *sequita*, past participle, feminine, of *sequere* to follow.<sup>15</sup> The Mediaeval Latin and especially the Anglo-Latin form of the substantive appears as *secta*. A commonplace of English legal history is the institution thus named—the group of witnesses that followed the plaintiff to court to substantiate his claim or at least to make evident its good faith. When the common-law declaration concluded with the words *inde producit sectam*, etc., it was originally referring to the train of followers thus accompanying the plaintiff. And when, by reason of the statute of 1731, the pleadings were turned into English, the words in question were translated as "thereupon he brings his suit, etc.," so that without knowledge of its origin one might suppose that this locution referred to the act of commencing the action. It is not improbable that the translator, himself, was ignorant of the original meaning of the clause and supposed that *secta* meant "suit" in the sense of action.<sup>16</sup> In any event, there is at first sight a temptation to conclude that the use of the *secta* initiated the employment of "suit" in this sense. But the term "suit" was applied so widely in early England to denote a variety of activities in attending and following<sup>17</sup> that we are bound to suppose it was the plaintiff pursuing the defendant rather than the *secta* following the plaintiff which gave rise to that employment. For one thing, it would otherwise be hard to explain why, after the rise of the court of chancery, men should come to speak of "actions at law" and "suits in chancery" rather than the converse. "Suit" must therefore be referred to a more general source than the institution of the

14. Cent. Dict. s. v. *Curia*; O. E. D. s. v. *Curia*.

15. O. E. D. s. v. *Suit*.

16. Zane, A Year Book of Richard II (1915) 13 Mich. L. Rev. 456. Perhaps even Spelman fell into this error, for, as part of his definition of *secta*, he says: "*Secundo, pro juris actione, vel litis prosecutione: quo sensu, cum litis causam actor exposuerit, sectam se inde (dicit) producere.*" *Glossarium archaologicum*, s. v. *Secta*.

17. See the instances in O. E. D. s. v. *Suit*. In 2 Pollock & Maitland, *History of English Law* (2d ed. 1899) at 606, after reference to the appeal of felony in which the appellant alleges "fresh suit" with hue and cry, occurs this interesting observation: "It should not escape us that in this case, as in other cases, what the plaintiff relies upon as a support for his word is 'suit.' This suggests that the suitors (*sectatores*) whom the plaintiff produces in a civil action have been, at least in theory, men who along with him have pursued the defendant."

7. Engelmann-Millar, *History of Continental Civil Procedure* (1927) 199.

8. See 2 Grimm, *Deutsche Rechtsalterthümer* (4th ed. (1922) 429.

9. Lewis & Short, *New Latin Dict.*, s. v. *Cohors*.

10. Weekley, *Words Ancient and Modern* (1926) 27.

11. *Ibid.* 28.

12. See Jenks, *Law and Politics in the Middle Ages* (1898) 129 seq.

13. "In mediaeval Latin *curia* was the word regularly employed to render French *cour*, 'court.'" O. E. D. s. v. *Curia*. Accordingly, it was at one time supposed that *curia* was the original of "court" both in its French and English forms: see Cowell, *The Interpreter* (1658) s. v. *Court*.

*secta*. The term *cause* offers no difficulty. Through the French word of the same spelling, it has come, without adventure, from the Roman and Romano-canonical procedures, in both of which *causa* was used with substantially the same meaning as the English term.

### "Summons," "Citation," "Subpoena"

*Summons* is from the Old French *sumunce* or *sumounse* (later *semonce*) a derivative of the Popular Latin *summonere* = *sub* + *monere*, formed from Latin *monere*, "to warn."<sup>18</sup> The noun in Mediaeval Latin appears as *submonitio*. In early and classical Roman law the warning of the defendant to appear was known as *in jus vocatio*, but in the days of the later Empire we find *conventio*, *admonitio* and *commonitio*.<sup>19</sup> *Submonitio*, however, seems not to have antedated the Middle Ages. The French legal vocabulary has long since laid aside the kindred term, the modern summons being called *ajournement*. The etymology of "summons" likewise accounts for the term *monition*, employed in our admiralty procedure. In the Romano-canonical procedure *citatio* was the word for the usual initial process. This came from the Latin *citare*, "to set in motion," a verb which had some use in relation to Roman legal proceedings in the sense of calling or summoning parties or witnesses,<sup>20</sup> although, as above indicated, not the source of the formal term for initial process. *Citatio* has yielded the ordinary term for summons in the Romance languages other than French (Ital. *citazione*, Sp. *citación*, Port. *citação*, Roum. *citațiune*) and has contributed *citation* to our stock of legal terms, this, on the one hand, through the influence of the English admiralty and ecclesiastical law, reflected in our admiralty and probate procedure and, on the other, through the Spanish influence in Louisiana and Texas, which has caused the ordinary summons in these jurisdictions to be known by this name. *Subpoena* (or more accurately, *subpoena ad respondendum*) as the name of the initial process in the High Court of Chancery—devised, as it is said, or at least adapted to the purpose in hand by John Waltham, Master of the Rolls and Keeper of the Seal in the time of Richard II<sup>21</sup>—and of like process in America, as in the Federal equity practice before the new Rules, is explained, as every lawyer knows, by the words of the document requiring appearance *under the penalty* of a sum named. Incidentally, similar considerations account for the word *subpoena* in the case of witness-process, where it seems to have had a longer history than in the other field.<sup>22</sup>

### "Pleading"

Only in the Anglo-American and Scottish systems is there such a specific term "denoting the sum of the rules governing the framing and presentation of allegation and prayer"<sup>23</sup> as appears in our word *pleading*. Nor in the Continental systems is there any such adequate term for the collective allegations as we possess in *pleadings*. Although the principle of oral allegation

obtains in large measure in France and Germany, written allegations have a place, but for these the nearest equivalent to "pleadings" would be in the one case *conclusions* (prayers) and in the other *Schriftsätze* (written statements). In Italy the documents of allegation are known as *comparse* (appearances) while in Spain they have no more technical name than *escritos* (writings).<sup>24</sup> Our word *pleading* is the offspring of the Old French *plaidier*, which in turn goes back to the Latin *placere*, to please. *Placitum*, the past participle, neuter, of the verb last mentioned, served under the later Roman Empire as an individual designation of the constitutions and rescripts of the Emperors, as also at times to signify a judicial judgment.<sup>25</sup> Manifestly, the idea was that these evidenced what was pleasing to the emanating authority. In the Middle Ages the same word was applied to a variety of uses, which included its denotation of a judicial assembly.<sup>26</sup> Since the verb *placitare* meant, among other things, to litigate before the assembly, the term *placitum* was further employed in the sense of a judicial controversy.<sup>27</sup> We still use the term in this sense when we speak of the *placita* with which commences the appeal transcript of record, reciting "*Pleas* before" such and such a court. From these applications of *placitare* and *placitum*, transition to their use in relation to the allegations of the litigated controversy was comparatively easy, and so, through the French, "pleading" and "plea" became established procedural terms, but in this evolution the root-meaning was lost. Coke, indeed, seems not to have thought so, for he tells us with all gravity that the word "pleading" comes from *placendo*, "because good pleading is of all things the most pleasing."<sup>28</sup> We doubt whether even Sir Edmund Saunders or Baron Parke would have subscribed to this sentiment, but Coke was correct enough as to the derivation. Yet we may glimpse, perhaps, a trace of *placere* in a collateral connection. For, after all, we cannot help the reflection that the "May it please the court" with which counsel opens his oral argument contains a suggestion of this root-meaning. For centuries, of course, the oral argument has been "pleading" only in a lay sense. But when we consider that at least until late in the fifteenth century the technical pleadings also were oral, it is readily seen that the two senses, the lay and the professional, must have subscribed to this sentiment, but Coke was correct *plaidier*, which was both Continental French and Anglo-French, has in France never departed from what corresponds to our lay sense and that the French *plaidoyer* continues to denote the oral argument made at the bar.

### "Bill"

Of the terms used to identify the first pleading of the plaintiff, *bill* is the subject of dispute. According to the orthodox lexicographical view, it comes from a Mediaeval Latin *billa*, whose source, through transmutation of "u" into "ü," was the Latin *bullā*, meaning

18. O. E. D. s. v. *Summon*, *summons*. "*Summoneo* is compounded of *sub* & *moneo*, & *euphoniae gratia* it is said *summoneo* to warne or summon, as in this case [that of the writ of assize] the sherife must warne or summon the recognitors of the assise" etc. Co. Litt. 158 b.

19. Collinet, *La Procédure par libelle* (1932) 93.

20. See Heumann-Seckel, *Handlexikon zu den Quellen des römischen Rechts* (9th ed. 1907) s. v. *Citare*.

21. See 1 Spence, *Equitable Jurisdiction of the Court of Chancery* (1846) 338 note c.

22. Gilbert, *Forum Romanum* (ed. Tyler, 1874) 36-77.

23. Millar, *Some Comparative Aspects of Civil Pleading under the Anglo-American and Continental Systems* (1927) 12 A. B. A. J. 401.

24. For the systems of pleading in these countries, see Millar, *op. cit. supra* note 23, at 402 seq.

25. Brisonius, *De verborum significatione* (ed. of 1743) s.v. *Placitum*.

26. The different uses appear in Du Cange, *Glossarium mediae et infimae Latinitatis* (ed. of 1886) s.v. *Placitum*. "The *placitum* of the Frankish laws . . . seems to correspond fully to the German *ding*: it is not only the resolution arrived at (*id quod placuit populo*) but also the assemblage of the people and the judge." 2 Grimm, *op. cit. supra* note 8, at 355.

27. See Du Cange, *Glossarium*, loc. cit.

28. "*Quia bene placitare super omnia placet*," adding: "and it is not, as some have said, so called *per antiphrasin*, *quia non placet*." Co. Litt. 17a.

a boss or stud, and so a seal, and by later extension a sealed document, as in the expression "Papal bull."<sup>29</sup> The opposing and much more persuasive view is that it is a so-called clipped formation from the French *libelle* (Latin *libellus*). This opinion was advanced by Mr. Bolland, who, from a review of the evidence offered by early English literature in which one use of "libel" was the original one of *libellus* in meaning "little book," concludes that the facts

"seem to show that 'libel,' or, in its English form, 'book' had the two meanings of a complaint and a small piece of parchment with writing on it; and that 'bill' had these same two meanings also. 'Libel' and 'bill' were in fact double synonyms. This seems established. But were they not something more than synonyms only? 'Libel,' or 'libell,' as it was often written, comes to us from the French '*libelle*,' and the accent not improbably was on the final syllable. Seeing, then, that the two words convey exactly the same meaning, is it not more likely that 'bill' is a clipped form of 'libel,' than that it is a form of 'bull,' with which it is not even synonymous, and for its derivation from which the only argument seems to be a purely hypothetical change of 'u' into 'ü,' for which no sort of authority or parallel can be adduced?"<sup>30</sup>

In harmony with what thus appears, it may further be said that the widespread use of "bill" for documents of many descriptions which has come down to modern times, corresponding very much with the Roman employment of *libellus*, is totally at variance with the notion that the word originated as the designation of a sealed instrument. And the relationship to *libellus* seems to be especially probable in the present connection, since the "bill" as an initial pleading, so far at least as concerns civil procedure, stood exactly in the place of the *libellus conventionis* of the later Roman system and the *libellus* of the Romano-canonical.

#### "Declaration," "Complaint," "Petition"

Our word *libel* as the name of the initial pleading in admiralty and certain other special fields of judicature is, of course, nothing else than the Roman *libellus* made standard in later days by the mediaeval Italian jurists. The term *count*, which now denotes a component unit of the initial pleading, and in the days of the old real actions signified for these actions this pleading as a whole, is from the Old French *conte*, meaning a narrative, the source of which was the Latin *computare*, "to sum up." *Declaration* is a sufficiently natural formation, derived, probably through the Old French word of the same spelling, from the Latin *declarare*, "to make clear," and has no specific Continental antecedent for the technical sense in which it was used at common law. The standard Anglo-Latin word for declaration was *narratio*. This had its source in the Byzantine law: it is the term used in the Code of Justinian to designate the plaintiff's statement of claim made orally before the court.<sup>31</sup> The word long survived in America in its abbreviated form of "narr.": not until 1934 did the Illinois plaintiff cease to use a "narr. and *coquoril*" in seeking the entry of a judgment by confession. *Complaint* is from the French *complaindre*, originating in Latin *plangere*, "to lament," whose primitive meaning in this sense was

"to beat the breast." No word from this root appeared in the Roman law as a technical legal term. In all likelihood the legal application of *complaindre* arose in Germanic France, as a translation of the German *klagen*, "to complain," in the sense of bringing an action. The substantive *Klage* was and still is the German word for "action." And in the Old French procedure *complainte* served especially as the name of a possessory action of Germanic origin.<sup>32</sup> The word "complaint" has had an extensive use in our own law. It appears in criminal procedure; it characterizes the bill in equity; and the verb "to complain" entered into the introductory formula of the common-law declaration, rendered, under the régime of Latin pleadings, by the Anglo-Latin *queror*, a deponent form from the classical Latin *quaero*, "to inquire" or "to seek." Moreover, it has been a standard term in the civil procedure of a majority of the American states commencing with its use in the New York Code of Procedure of 1848. Its dwarf sister *plaint* (Anglo-French *plainte*) has also been widely employed. At common-law it appears in relation to the possessory assizes; it identified the assertion of claim in an inferior court and at one time served for the same purpose in the King's Bench with reference to actions of trespass.<sup>33</sup> It has had some application in America; it is today a term of the English County Court practice, and is the name of the statement of claim in the civil procedure of British India. Manifestly, the root here in question has been a fertile one for Anglo-American procedure. *Petition*, on the other hand, goes back to the technical terminology of the Roman law, where appeared *petitio*, formed from *petere*, which, among other meanings, had that of "to request," "to pray." The Romans used the term *petitio* as a synonym for *actio*, in referring to the *actiones in rem*, as in the case of the *petitio hereditatis*, the action by the heir to recover the estate in whole or in part, but also used it in a wider sense as signifying the application for legal relief in general. The two words *complaint* and *petition* are historically identified with distinct theories in relation to the plaintiff's approach to the court.

"The term 'complaint' carries the impress of the Germanic theory of the action as the assertion of a wrong done to the plaintiff, in contradistinction to 'petition,' which is colored by the Roman theory of the action as a seeking for satisfaction of the plaintiff's right, the yielding to him of his due. While the two theories contemplate identical ends, the one stresses the *wrong*, the other the *right*: the one has chiefly the aspect of an invocation of the court, the other, the assertion of a right against the adversary."<sup>34</sup>

But the Roman theory having come to prevail in the modern law, it is obvious that our use of the two terms carries with it nothing of this historical distinction.

#### "Plea," "Answer," "Replication"

If we turn to the subsequent pleadings we find that *plea* is the Old French *plaid* and its variants (Anglo-French *ple*, *plee*), the substantive of *plaider*. *Answer* has the distinction of being one of the few procedural

29. Skeat, *Etym. Dict.* (ed. of 1910) s.v. *Bill*; Cent. Dict. s.v. *Bill*; O. E. D. s.v. *Bill*.

30. Bolland, *Introduct. to Select Bills in Eyre* (Selden Soc.) xi-xv. The view thus expressed is favored by Professor Holdsworth, *A History of English Law* (3d ed. 1922) 339.

31. Cod. III, 9, 1. un.; Cod. III, 1, 1. 14 § 4(1); Cod. II, 58 (59) 1. 2, pr.

32. 2 Loysel, *Institutes coutumières* (ed. of 1846) 422; Viollet, *Histoire du droit civil français* (3d ed. 1905) 583.

33. "Anciently, it seems, the process in trespass on the King's Bench was founded on a *plaint* or *queritur* entered on the records of the court," 1 Tidd, *Practice* (9th ed. 1828) 146.

34. Millar, *Pleading under the Illinois Civil Practice Act* (1933) 28 Ill. L. Rev. 461 n. 2 citino Chiovenda, *L'azione nel sistema dei diritti*, in 1 *Saggi di diritto processuale civile* (1930) 57-58.

terms of Anglo-Saxon origin. It descends from the Anglo-Saxon *andswaru*, signifying a response or counter-statement, whose primitive meaning seems to have been that of "a swearing against."<sup>35</sup> The idea thus suggests itself that, although by accident, it is the answer under oath which is most true to the etymology of the word. *Replication* is from the Latin *replicatio*, the name given to the part of the Roman formula which embodied the plaintiff's affirmative answer to the defendant's *exceptio* presently to be mentioned. The term was derived from *replicare* "to fold," and thus "to bend back," there being here a figurative reference to its effect, if successful, in turning aside or repelling the defendant's assertion.<sup>36</sup> *Reply* is the same word, modified through *replier*, the French adaptation of *replicare*.

#### "Demurrer," "Exception"

More sharply affected by the vicissitudes of procedural history are the terms *demurrer* and *exception*. Coke tells us that "demurrer" comes from the Latin *demorari*, "to abide," "and therefore he which demurreth in law is said he which abideth in law."<sup>37</sup> This is correct as far as it goes, the intermediate form being the Anglo-French *demorer*, *demurer*. By Coke's time the word had taken on its present-day meaning of objection in point of law to an antecedent pleading. But its original use was otherwise. Originally "to demur" signified that the party abided or rested his case upon the point arising by virtue of the objection, and this whether he was the objecting party or the party against whose pleading the objection was directed. In other words, "demurrer," in its early sense, was not the name of a procedural weapon, but denoted the conduct of one party or the other, attendant upon the putting forward by either of the objection in point of law.<sup>38</sup> In its later use the term has been an extremely valuable one as giving a specific label to a particular kind of objection in law, and it is especially unfortunate that modern procedural reform, through a mistaken notion of effecting simplification, has in various quarters seen fit to discard it. The term *exception* proceeds from the Latin *exceptio*. As a legal expression the latter took its rise in the second or formulary period of the Roman procedure, the characteristic of which was that the *praetor*, after a preparatory hearing, issued his written command—the *formula*—to the *iudex* appointed to try the cause, directing that he "condemn" or "absolve" the defendant in accordance with its terms. Basically, the condition of condemnation, although usually stated by way of legal conclusion, would be the existence of what we would call the "cause of action." Thus: "Titus, be *iudex*. If it appears that Numerius Negidius owes (*dare oportere*) to Aulus Agerius<sup>39</sup> 100 sesterces, condemn him, otherwise absolve him." But it may be that the defendant has a defense, not in denial of the cause of action, but such as renders it unavailable to the plaintiff, or, in the language of our common law, such as avoids the action. The defendant, for example, maintains that the plaintiff has made an agreement not to sue. In such case the proposed defense enters into

the formula as a sub-condition, in this wise: "Titus, be *iudex*. If it appears that Numerius Negidius owes to Aulus Agerius 100 sesterces, then if there has been no agreement between Aulus Agerius and Numerius Negidius that that money would not be sued for, condemn him, otherwise absolve him."<sup>40</sup> Accordingly, "since this further condition is looked upon as something subtracted or excepted from the principal condition, it is known as an *exceptio*."<sup>41</sup> From this fact the name came to be applied to the defensive right itself. And when the formulary procedure disappeared, the same name continued to be used for this manner of defensive right and was employed as well for the allegation asserting it. With similar application to the defense, but not always with the same precision of meaning, the word became part of the mediaeval procedural vocabulary, and in Anglo-Norman times was adopted in England, where it came into employment as the designation of the defensive allegation in general.<sup>42</sup> In the early Year Books the defendant's allegation, whether of fact or of law, so far as it has a definite technical name, is always an "exception." The word "plea" for his allegation of fact does not come into technical use until a later day, probably in the fifteenth century.

Now it was just at this period of "exceptions" that there was passed the statute (Stat. Westminster II, 1285, 13 Edw. I, c. 31) which is the source of bills of exception. In that day, the pleadings being oral, an allegation was not permitted to be entered of record, unless it met the approval of the court. Hence, if the defendant advanced an "exception" in the sense noted, and the court, either by reason of what was argued on the other side or otherwise, declined to allow it to go upon the roll, there was no way in which the defendant might assign this decision as error, for obviously the court of error could not look beyond the record. To remedy this situation the statute provided that when one impleaded before any of the justices "proposes an exception" (*proponat exceptionem*) and unsuccessfully prayed to have it allowed, he was to write the exception and pray that the justices affix their seals in witness, which should accordingly be done, and one declining another was to act. Thus the court was required in effect, by sealing the disallowed exception, to make it a part of the record for the purposes of the proceeding in error. But the point here to be noted is that, as concluded in Mr. Zane's learned article, the term "exception" of the statute did not mean anything else than the defensive allegation later coming to be known as the "plea" or the "demurrer."<sup>43</sup> Two cases from the reign of Edward IV serve to illustrate the early operation of the statute. In one the defendant in assize pleaded a release to a tenant at will by the lessor "and the opinion clearly was that the release was not valid. . . . Gennev and other apprentices prayed that the plea be entered. Markham: It shall not be, but make a bill and we will seal it."<sup>44</sup> In the other, an action of debt upon a written obligation against J. W. of D., the defendant pleaded in abatement that there were two D.s in the same county and neither without addition.

35. O. E. D. *s.v.* Answer.

36. "... quae replicatio vocatur, quia per eam replicatur atque resolvitur ius exceptionis." Inst. Just. IV, 14.

37. Co. Litt. 71b.

38. Horwood, Intro. to V. B. 12 & 13 Edward III (Rolls Series) lxxxv; Zane, *op. cit. supra* note 16 at 459; Millar, *The Fortunes of the Demurrer* (1936) 31 Ill. L. Rev. 440-441.

39. Aulus Agerius and Numerius Negidius were the John Doe and Richard Roe of the Roman law.

40. Sohm-Mitteis-Wenger, *Institutionen* (17th ed. 1928) 701-702.

41. Millar, *Legal Procedure* (1934) 12 Encyc. Soc. Sci. 441.

42. 2 Pollock & Maitland, *op. cit. supra* note 17, at 611-612.

43. Zane, *op. cit. supra* note 16, at 457-458.

44. Pasch. 2 Edw. IV, 6, pl. 14, anno 1462.

Brian ruled the defendant to answer over, because the defense contradicted the terms of the defendant's own obligation, which referred to the defendant as of D. only. "*Briggs*. We pray that you seal a bill of our exception. *Brian*. Make your bill and I will seal it with my own seal."<sup>45</sup>

By Coke's time, the term "exception" in this connection had taken on substantially the same meaning that it has today, for he specifies, among the matters to which it extends, "challenges of any jurors, and any material evidence given to any jury, which by the court is overruled."<sup>46</sup> The reason for this widening is not far to seek. As distinct from the application of the term "exception" to the defensive allegation proper, there was at least one other avenue by which it entered our legal vocabulary. While regularly used in the Romano-canonical procedure in respect of a defensive allegation, we also find it there employed to signify an objection to the competency of a witness<sup>47</sup> or even of an evidentiary document.<sup>48</sup> This use was taken over by the Anglo-Norman law. Glanvill, speaking of the grand assize, says that the tenant "may possibly have a just cause of exception against one or more of the twelve," and that "jurors may be excepted against by the same means by which witnesses in the Courts Christian may be justly rejected."<sup>49</sup> Given such a point of departure, it is not difficult to see how the term could come to be enlarged in legal usage to include the general notion of objection in other directions. And accordingly, it is not at all strange that, as a result of interpretation of the statute, notwithstanding the disappearance of the original reason for

its existence, the word should assume in this connection its later meaning and denote any objection taken to a judicial ruling in the trial court not appearing as part of the common-law record. The same general notion of "objection" acquired by the term, whether aided or not by lay usage, likewise accounts for its use in chancery as designative of an objection for insufficiency of the answer or for fault of the master's report or the like. This, too, rather than the above noted adoption of the term in the specific sense of a defensive allegation, probably accounts for its one-time employment in criminal procedure to indicate an objection to the legal sufficiency of the indictment. How far the term, both in the past and present of Anglo-American law, has thus wandered from the original meaning of the Roman legal word *exceptio* is something that requires no stressing.

### "Trial"

The English language possesses a unique technical term in the word *trial*. Its graphicness and precision find no echo in any of the Continental vocabularies. The French and Italian systems have to content themselves, respectively, with *audience* and *udienza*, translatable with fair exactness by our word "hearing," as accenting one side of the episode in question, and with *debats* and *dibattimento*, signifying the forensic arguments, as accenting the other. More compendious, but thoroughly bleak, is the nearest German equivalent, *Verhandlung*, literally, "transaction." As distinguished from the *viva voce* presentation of evidence in open court characteristic of common-law trial by jury, the traditional Continental mode, in collegial courts, of proceeding by deposition taken before a single judge or other court-officer, from which, as to civil causes, no very radical departure exists in actual practice today, has been an important factor in preventing the development of any term closer to our "trial." The case, indeed, was the same in the Anglo-American equity procedure of a former day, which equally discounted oral testimony in open court, and with relation to the argument of the cause in chief, spoke, accordingly, not of "trial," but of "hearing." And although for criminal causes jury trial and *viva voce* testimony in open court were introduced into many of the Continental countries as one of the consequences of the French Revolution, the change came too late to affect the manner of speech in the present regard. Looking at the etymology of the word "trial" we cannot but be impressed with the aptness of the metaphor which it embodies. The Oxford English Dictionary tells us that it comes from Old French *trier*, meaning "to sift" or "to pick out." There was a Mediaeval Latin verb-form *triare*, but this was derived from the French or the corresponding Provençal word. "The legal use appears to have developed in Norman-French, where it is known in 1280; there is no trace of this use in Continental French."<sup>50</sup> It must have been an acute mind that first added this term to the legal vocabulary, and the association is just as perfect today as it ever was, for what is a trial but the "sifting" of the matters in dispute between the contending parties?

### "Verdict"

*Verdict* is from Anglo-French *verdit*, a transplanted Old French term of kindred spelling, derived, like the Mediaeval Latin form, *verdictum*, as a compound from the Latin *vere* and *dictum* ("truly said").

50. O.E.D. *s.v.* *Trial*. *Triare* appears in Bracton, fol. 105a (*U*iss ed. Vol. II (1879) p. 156).

45. Mich. 2 Edw. IV, 13, pl. 18, anno 1462. For these two references we are indebted to Raymond, *The Bill of Exceptions* (1846) 55.

Certain fourteenth century cases cited by Professor Plucknett (*Statutes and their Interpretation in the Fourteenth Century* (1922) 68) in support of the view that this statute was one which, at the outset, the courts were disinclined to enforce are here of interest. For they lend further confirmation to Mr. Zane's conclusion, when we note the subject-matter in respect of which bills of exception were there sought. Thus:

(1306) *Anon v. Parson of St. Mary of East Salenam*, Y. B. 33-35 Edw. I (Rolls Series) 138—a succession of defensive allegations, spoken of as "*nos resonans*."

(1313 or 1314) *Scoland v. Grandison*, Y. B. 6 & 7 Edw. II, Eyre of Kent (Selden Soc.) 176—plea in abatement of the writ, spoken of as "*nostrae chalange*."

(1338) *Earl of Devon v. Lucy*, Y. B. 12 & 13 Edw. III (Rolls Series) 48-49—"his exceptions and allegations put forward in the plea aforesaid" ("*exceptiones et allegationes suae in placito praedicto propositae*").

(1346) *Stonore v. Abbot of Buckfastleigh*, Y. B. 20 Edw. III, I (Rolls Series) 242-243—successive pleas in abatement spoken of as the defendant's "*chalanges*."

We think, however, that Mr. Zane carries the point much too far when he says that since the words of the statute show that it referred only to a disallowed pleading, "it is plain that the ordinary historical folly of Blackstone and Tidd to the effect that this statute provided for a bill of exceptions is monumentally absurd . . . it had no more application to a bill of exceptions than would a verse of the Koran." pp. 457-458.

46. 2 Co. Inst. (4th ed. 1671) 427.

47. Aegidius de Fuscariis, *Ordo iudicarius*, C. LXI, in 3 Wahrmund, *Quellen zur Geschichte des römisch-canonischen Processes im Mittelalter* (1916) 1 Heft, p. 113; Durantis, *Speculum juris*, Lib. I, Partic. IV, Rubr. *de teste*, § 1, no. 32 seq. (Vol. I, p. 286 seq. ed. of 1578).

48. Tancred, *Ordo iudicarius*, Tit. 13, § 6 (ed. Bergmann, 1842, p. 255); Durantis, *op. cit. supra* note 47, Lib. II, Partic. IV, Rubr. *de instrumentorum editione*, § 4, no. 15 (Vol. I, pp. 639, 642).

49. Glanvill, Bk. II c. XII (Beames transl. ed. Beale (1900) 49; Latin text, ed. Woodbine (1932) 65, 66).

and thus meaning "true statement."<sup>51</sup> And the word seems to enclose in itself the history of the jury, which originating in the Germanic community-witnesses brought forward to swear to a formulated statement of fact with their actual or presumptive knowledge, became in turn the Frankish, the Norman, and then the Anglo-Norman inquest, answering questions as to matters of its knowledge, and eventually, with its members shorn of their character as witnesses, became the body which we know today. Had the jury in origin been other than a group of mere witnesses, its report would have come to bear some name more suggestive of its decisory function than "true statement."

### "Judgment," "Decree"

*Judgment* finds its parentage in the Old French and Anglo-French *jugement* (the word in modern French being the same), which corresponded to the Mediaeval Latin *judicamentum*, a derivative of the Latin *judicare*, "to judge." Apart from its relationship to *jugement* and also to the Portuguese *juízo*, which, in its more technical use signifies the process of judging, *judicamentum* is not a word of signal importance, for it does not appear to have been extensively used. The word *judicium* was much more often employed in the Middle Ages to express the idea of judgment, as in *judicium Dei*, the judgment of God, denoting the result of ordeal and especially of trial by battle. And *judicium* has the standard meaning of "judgment" in Anglo-Latin. This, however, was a perversion of the Latin meaning of the word which in one sense denoted the proceeding before the *judex* after the cause had been sent to him by the *praetor* and in a wider sense the proceedings as a whole. It was never used by the Romans in the sense of "judgment." For them the judgment was the *sententia*—a term represented today by the usual word for "judgment" in the professional terminology of most of the Romance languages (Ital. *sentenza*, Sp. *sentencia*, Port. *sentença*, Roum. *sentință*), by the French *sentence*, used in criminal procedure, as also to designate certain quasi-judicial decisions, such as the award of an arbitrator, and also by the *sentence* of our own criminal procedure. The Roman sense of *judicium* is preserved in the Italian *giudizio* and Spanish *juicio*, both of which, though sometimes applied with the meaning of "judgment," more usually and more technically signify the judicial proceeding. Of directer descent than "judgment" from the Roman legal vocabulary is the term *decree*. This comes from Latin *decretum*, originally the neuter past participle of *decernere*, "to decide," which had its source in *cernere*, "to separate" or "distinguish." As regards judicial proceedings, the word *decretum* in the classical period was the name given to orders made by the *praetor* in the exercise of his extraordinary jurisdiction, and in the imperial period came into frequent use for both interlocutory orders and final judgments in general. The term found place in the Romano-canonical procedure as the designation of certain orders normally interlocutory but which might be of final effect.<sup>52</sup> Accordingly, it is in nowise surprising that, in the formation of our chancery procedure, its ecclesiastical architects should have adopted the word "decree" instead of "judgment" to denominate the recorded decision of the cause. And the use of the same word in admiralty is due to the same Italo-Roman

influence, although it was left to the American admiralty practice to employ the term, instead of "sentence," as a standard expression for the final judgment.

### Postscript

In the foregoing account of a few of the more usual items of our procedural terminology there appear conspicuous instances in which the pursuit of verbal origins carries us back into the history of institutions. As elsewhere in the language, the root-meaning of the words surveyed has generally suffered mutations of greater or less degree, sometimes, indeed, has disappeared or is scarcely detectable, but sometimes, again, is of persisting vitality. Incidentally, these examples show how much our legal language owes to Latin, either more or less directly or through the medium of Norman-French. Whether a particular institution is of Germanic or Roman origin, the fact that the men who welded the principles of the two systems in the formation of English procedure habitually spoke Norman-French, or, to use a more accurate term, Anglo-French, and that the language of recordation was Latin, rendered it inevitable that French or Latin should have engendered most of our procedural terms.<sup>53</sup> Here there was no room for any such parallelism of French and Anglo-Saxon words as existed with reference to the things of daily life (witness the conversation of the jester and the swineherd in Sir Walter Scott's *Ivanhoe*), and to a limited extent, also, with reference to the more common legal transactions outside of court,<sup>54</sup>—for the administrators of the procedure were the administrators also of its language. As compared with the corresponding terminology of the Continental systems our own procedural terminology has, on the whole, no occasion to reproach itself. There are some conceptions expressible in our system only by a circumlocution, for which specific terms exist on the Continent, but, on the other hand, we have instances of adequate terms where the Continental terms are lacking in adequacy. While capable of improvement, our terminological heritage is not likely to undergo any radical recasting; any such movement, for example, as that which in nineteenth century Germany brought about a general de-Latinizing of legal terms would be at war with the composite character of the English tongue. Improvement, indeed, is not likely to come very fast. For, unlike the medical profession, lawyers are highly averse to invention of new terms, and, for some unknown reason, especially so if they have too strong a flavor of classical root—even if the new term is a scientific need for a new or newly identified conception. In any event, it is a distinctly serviceable vocabulary that we have been bequeathed and if the profession is reluctant to make scientific addition, it is in duty bound to hold fast to what we have, throughout every simplification of procedural institutions, so long as the old precision of meaning remains basically unaffected.

53. "... We enter a court of justice: court, justices, judges, jurors, counsel, attorneys, clerks, parties, plaintiff, defendant, action, suit, claim, demand, indictment, count, declaration, pleadings, evidence, verdict, conviction, judgment, sentence, appeal, reprieve, pardon, execution, every one and every thing save the witnesses, writs and oaths, have French names." 1 Pollock & Maitland, *op. cit. supra* note 17, at 81.

54. E. g. "act and deed," "will and testament;" not coupled in usage, "bond" and "obligation." See on this point Weekley, *The English Language* (1929) 67; *id.*, *Cruelty to Words* (1931) 43. As to the respective parts played by Anglo-Saxon and French in the formation of the legal vocabulary in general, 1 Pollock & Maitland, *loc. cit.*

51. O.E.D. *s.v.* *Verdict*; Skeat, *Etym. Dict.* (ed. 1910) *s.v.* *Verdict*.

52. Durantis, *op. cit. supra* note 47, Lib. II, Partic. I, Rubr. *de primo et secundo decreto*, § 1 (Vol. I, p. 458).

# JUSTICE AND CIVIL LIBERTIES\*

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The policy of the Department of Justice has been emphasized by the creation within my Division of a special Civil Liberties Unit, to pay particular attention to civil liberties problems. It is elementary constitutional law, however, that the Federal Government lacks general jurisdiction, and the Criminal Division of the Department of Justice operates within an even narrower scope, for our primary job is that of prosecuting violations of specific Federal crimes. I need hardly remind you that some of the great civil liberties cases of the last few years, the *Hague* case,<sup>1</sup> for example, were not criminal cases at all and that cases like *Powell v. Alabama*,<sup>2</sup> although criminal prosecutions, came up through the state courts. Confining the discussion, therefore, to criminal prosecutions by the Federal Government, if we put to one side the comparatively easy and rare cases, such as peonage, where we have specific statutes, it is striking that for the type of case normally contemplated by the term civil liberties—free speech, free press, intimidation, discrimination, abuse of criminal prosecution machinery—there are comparatively few statutes making deprivations of civil liberty Federal crimes. In this field, the Division relies almost exclusively on the Civil Rights Statutes of Reconstruction days, now embodied in Sections 51 and 52 of Title 18 of the United States Code.

Section 51, the section which makes it a Federal crime for two or more individuals to conspire to deprive any citizen of rights secured by the Constitution or laws of the United States, on its face purports to deal with individual action. Official or colorably official action by State officers is the more particular province of Section 52, cast in terms of penalties for action depriving an inhabitant of Constitutional or Federal statutory rights, privileges, or immunities, "under color of law, statute, ordinance, regulation, or custom." Without attempting any detailed exposition of the latter statute before this audience, I may say that the concluding words of its second clause, referring to alienage, color, or race, raise a question which has never been authoritatively settled, whether the statute is not restricted in all its phases to discrimination against negroes, aliens, and racial minorities. Section 51, however, although it extends protection only to citizens, rather than to the more general class of inhabitants mentioned in Section 52, is on its face applicable to a wider class of interferences with civil rights, since it does not contain at any point the troublesome limiting phrase restricting the prohibited discrimination to discrimination on the grounds of race, color, or alienage. There is a fairly clear indication in the *Mosely* case<sup>3</sup> that Section 51 can be made to do most of the work of Section 52 by treating a State official as accountable under Section 51, even in colorably official action, as a member of a conspiracy within that section.

The notable series of Supreme Court decisions in

recent years, extending the protection of the Fourteenth Amendment to the rights of free speech, press, and assemblage and the essentials of a fair trial, appear to bring these rights within Sections 51 and 52 either as liberties protected by the due process clause or, by a new departure in the *Hague*<sup>4</sup> case, as privileges and immunities of United States citizens.

The Supreme Court has had no direct occasion to pass on Section 52, but in the large number of cases in which Section 51 has come before the Court, the apparent scope of the statute has been severely restricted. No matter how much the content of the due process clause has been expanded, rights under the due process clause are not protected against mere individual action, on the standard interpretation of the Fourteenth Amendment as a restriction on State action only. The net result of this line of authority, typified by the *Wheeler*<sup>5</sup> and *Cruikshank*<sup>6</sup> cases, is that the statute is now held to be inapplicable to the great mass of civil liberties cases. I need not review these Supreme Court cases in detail. I am not prepared to state an opinion whether they represent sound law. I can tell you that the Criminal Division is now engaged in re-examining them, and that if we are convinced that they perpetuate an error, we shall have no hesitation in asking of the Supreme Court to overrule those authorities.

Such an enterprise, however, will be dependent upon the results of pending research. The importance and difficulty of the subject requires that the research be exhaustive and prevents any prediction either of its results or of the time when we will be ready to act on those results. Meanwhile we cannot sit on our hands, and we are proceeding with a current program based on the Supreme Court law as we find it. The *Cruikshank*<sup>7</sup> case, which I referred to a moment ago as a leading authority restricting the scope of Section 51, itself contains a dictum to the effect that the statute may be used to protect against interference with public meetings which contemplate petitioning Congress, and suggests that the Constitution protects citizens in all rights which are essential to the independent existence and functioning of the National Government. This doctrine has been successfully invoked in cases where individuals have interfered with the right of citizens to a vote and a fair count in electing Members of Congress,<sup>8</sup> or with the right to be protected from violence while in the custody of Federal officers or while informing Federal authorities of a violation of Federal law.<sup>9</sup> These rights are implied rights, without specific statute. More to the point, for our present program, is the line of cases emphasizing the fact that Section 51 in terms is directed at acts in derogation of rights under the laws of the United States as well as rights under the Constitution. This doctrine is typified by the

(Continued on page 1031)

\*From an address delivered before the National Conference on Civil Liberties, New York City, Oct. 14, 1939.

1. 307 U. S. (1939).

2. 287 U. S. 45 (1932).

3. 238 U. S. 383 (1914).

4. 307 U. S. (1939).

5. 254 U. S. 281 (1920).

6. 92 U. S. 542 (1875).

7. 92 U. S. 542 (1875).

8. *Ex parte Yarbrough*, 110 U. S. 651 (1883); *United States v. Mosely*, 238 U. S. 383 (1915).

9. *Loan v. United States*, 144 U. S. 263 (1891); *Quartes v. Butler*, 158 U. S. 532 (1894).

(Continued from page 1030)

*Waddell* case,<sup>10</sup> applying Section 51 to private interference with the establishment of claims under the homestead laws.

The application of this line of authority to the situations within the civil liberties field is suggested by the *Pennsylvania System* case,<sup>11</sup> which arose under the collective bargaining provisions of the 1920 Transportation Act. In that case, Section 43 of Title 8 of the Code, another of the Reconstruction statutes, was under consideration. It is the same statute as that involved in the *Hague* case, and was held inapplicable on the ground that the Transportation Act did not create a private right in the individual employees, since the collective bargaining provisions were enforceable only by publicity. This case and the *Hague* case, I think, serve as authority for the proposition that if a Federal statute otherwise constitutional gives a private right to a citizen, Section 51 will serve for prosecution of any group of persons who attempt to take it away from him by threat or intimidation. Section 51 then appears available against vigilantism affecting statutory rights under the recently extended commerce clause, for example, or any other phase of Federal power. The *Harlan* case, recently nulled as a part of a negotiated peace in the Kentucky mines, is the example that is freshest in mind. Here Section 51 was used to prosecute organized intimidation looking to deprivation of rights under the Wagner Act. I see no distinction in principle between this case and those of organized intimidation of tenant farmers, to deprive them of benefits under Federal agricultural aid acts, or similar activities directed against citizens on Federal relief rolls.

The scope of Section 51, as I have outlined it, leaves untouched all anti-alien activities and the many fields of action where the Federal Government has not entered with legislation and does not appear to be imminently contemplating legislation. The maintenance of civil liberties in these fields must be left to the State authorities, supported by the initiative of individuals in invoking the safeguards provided by the Constitutions and laws of the State and Federal Governments and by the educational work of such groups as this seeking to create a pervading respect for the maintenance of our democratic institutions and the bases upon which they rest.

Federal activity, unfortunately, can be used not only to guarantee, but also to deprive of civil liberties. The present war in Europe, although we remain neutral, is engendering in this country an intense nationalism. Irrespective of the way one may feel about an increase in nationalism, some of its manifestations, and I refer particularly to the well-founded fear of foreign propaganda, include an opposition to aliens as such, and a wave of anti-alien agitation which runs counter to the traditional principles of tolerance in this country. I have some fear that advocates of oppressive anti-alien measures will try to find a measure of aid and comfort in the recent tendency in the Supreme Court, manifested in the *Hague* case, to treat civil liberties as the privileges and immunities which the Constitution guarantees only to citizens, rather than as elements of the due process of law guaranteed to all persons. Even citizens, however, we know from our experience from

1914 to 1917, were harassed by all sorts of unorganized and semi-organized spy hunting and patrioteering, which was often nothing but a cloak for personal vindictiveness or a weapon in labor disputes. I hope that we can apply to our present situation some of the experience which the Department gained in those pre-war years and even in the war years. The Department had then to withstand terrific pressure for repressive activity under the successive increasingly drastic amendments of the Espionage Act. In order to prevent Federal prosecutors from yielding to that pressure, the Department found it necessary to issue instructions to all United States Attorneys, ordering them to clear with the Department before seeking indictments under the Espionage Act.

More difficult to restrain within proper and constructive channels is the zeal of many worthy citizens in private life to assume personal responsibility for the enforcement of what they think are the laws of this country. If their efforts are limited to presenting evidence of subversive activities to the constituted authorities, these citizens will serve a useful purpose. If, however, they undertake to intrude into the private affairs of their neighbors, or to take the law into their own hands, they will become as great a menace to our institutions as are the activities which they seek to expose.

I am not in a position to disclose to you in detail the program of the Department of Justice. I can state that like most American citizens we are proceeding on the assumption and fervent hope that the United States will stay out of the war in Europe. The Department has already announced that it is considering the creation of a special unit to handle espionage, propaganda, and similar problems which neutrals face in a world at war. That unit will be placed within the Criminal Division, under my supervision, and I can give you assurance that it will be closely coordinated with the Civil Liberties Unit, in order that the Department of Justice, which seeks to maintain those liberties, will not become an instrument of oppression.

In concluding, let me express my earnest hope and my confident expectation that the Department of Justice will respect the civil rights of all persons living in this country, whether or not its officers approve of their political program or social views. Officers of the Department were recently subjected to severe criticism by a Member of Congress for supposedly giving aid and support to the Communist Party in the United States by participating in this National Conference on Civil Liberties. Apparent to any one is the injustice of so characterizing the work of a conference which has brought together individuals and organizations representing diverse political views for the sole purpose of preparing to meet the threat which the conflicts of other nations hold to the American standards of liberty and justice. I think that the record of the Department of Justice adequately demonstrates the impartiality with which the Department seeks to enforce the laws of this nation. Whenever we have legally competent evidence, we in the Department will vigorously prosecute to the full extent of our authority those who, seeking to undermine American institutions, violate Federal laws. In the process, however, we will not lose sight of the Constitutional guaranties and will not risk destroying our liberties in an excess of zeal in seeking to defend them.

10. 112 U. S. 76 (1884).

11. 267 U. S. 203 (1924).

## JUNIOR BAR NOTES

By Joseph Harrison

*Secretary of the Junior Bar Conference*

**N**OTEWORTHY regional and State meetings featured the activities of the junior bar conference during the past six weeks. Correspondence from committee chairmen also indicates this phase of the conference is receiving careful attention.

### *Eastern State Meetings*

Continuing an annual event successfully inaugurated last year, the junior bar conference in Massachusetts, together with the Boston Bar Association, tendered a smoker reception to 221 newly admitted lawyers on Oct. 25. Arrangements on behalf of the conference were in charge of Robert R. Thurber, Boston, Massachusetts State chairman. The reception served as a pleasant opportunity for the younger and older lawyers to become acquainted. The Boston junior bar conference group meets every other Friday for luncheon at the rooms of the Boston Bar Association.

Frank L. Wiegand, Jr., State public information director, is planning to continue the previous public speaking activities in Massachusetts on the rostrum in behalf of the Red Cross and other worthy causes. In addition thereto he is preparing to launch a radio speaking program as soon as script is prepared. The conference has also assisted in the presentation of a series of lectures on the new federal rules.

Vermont, under the leadership of State chairman Osmer C. Fitts, Brattleboro, again is setting the pace for conference activity in the Second Circuit. A luncheon meeting for younger lawyers was sponsored in connection with the annual meeting of the Vermont Bar Association at Montpelier. Mr. Fitts presented the conference program for the current year. Particular emphasis will be laid on the legal institute part of the program.

In New Jersey the junior section of the State Association, an affiliate unit of the junior bar conference and led by men who are also active in the conference, held a well-attended meeting last month at Newark. The section will soon publish a State junior bar directory. It is designed to be of service to such courts as have occasion to make references or assignments. As an economic aid to younger lawyers the directory, which seems to be the first of its kind for this purpose, is an experiment which may prove helpful in other States. The committee is waiting for returns to a questionnaire sent to all section members. Robert B. Meyner, Phillipsburg, New Jersey State chairman for the junior bar conference (and vice-chairman of the State bar's junior section) has announced the appointment of the complete official conference family for the State including a chairman for each of the twenty-one counties and several committees.

### *North Carolina Meeting*

Conference chairman Paul F. Hannah, Washington, D. C., addressed what was reported to be the "largest gathering of attorneys ever assembled in North Carolina" on Oct. 27, when he spoke at the meeting of the North Carolina State Bar at Raleigh, on the function and mechanics of the public information program. Highlights of his address were his prefatory remarks on the need for an intelligent and carefully planned public relations program of the organized bar to keep the record straight as far as the bar is concerned. The

annual meeting of the State bar was made the occasion for a luncheon meeting sponsored by the junior bar conference of North Carolina. More than eighty younger lawyers from all parts of the State met at the Sir Walter Hotel where Egbert L. Haywood, conference State chairman for North Carolina, presided. Discussion centered on the conference's organization, the public information program, and problems with which younger lawyers are most concerned, e. g., fee schedules, and law libraries in small communities. It was enthusiastically and unanimously voted to make the luncheon meeting of the younger lawyers of North Carolina an annual affair.

### *Full Program in Ohio*

E. Clark Morrow, Granville, Ohio State chairman for the conference, advises that the junior section of the Ohio State Bar Association recently unanimously voted to adopt practically the same program as that of the conference in Ohio. Both junior bar groups will collaborate in promoting the public information program throughout the State. Emphasis will be on American Citizenship, particularly in assisting in naturalization proceedings. The fostering of relations between the organized bar and law students will also occupy the joint attention of both groups. Plans are being made to arrange for a series of lectures on practice and other legal subjects. Welcoming affairs to newly-admitted lawyers will also be part of this program. Surveys on the problem of legal aid facilities and the need for legal services will be made shortly.

### *Illinois Active*

Members of the junior bar conference residing in downstate Illinois met at Springfield on Oct. 21. At Chicago the committee on activities of younger members arranged for a series of four weekly lectures from Oct. 18 to Nov. 8. While executed by a local bar committee, this type of lecture series is a part of the national conference program. It is of interest to note that the personnel of the local committee included some of the junior bar conference's leaders.

### *Regional Meeting at Des Moines, Iowa*

A regional meeting of representatives of the junior bar conference and other junior bar groups was held at Des Moines on Nov. 4. This was held in conjunction with the regional meeting sponsored by the section of bar organization activities of the American Bar Association. Seven different groups and five States had representatives at the "round table" discussion that was held on Saturday morning. Ronald J. Foulis, last year's conference chairman, explained in detail the purposes and functioning of each part of the conference program and made suggestions as to how such work could be conducted in the several States represented.

### *Kansas Junior Bar in Third Year*

With two successful years behind it, the Kansas junior bar conference, first of the State units to be organized, launched its third year with the following officers at the helm: C. Harold Hughes, Manhattan, chairman, Chandler F. Jarvis, Winfield, vice-chairman, and Erle W. Francis, Topeka, secretary. To further the conference program of juvenile delinquency prevention, a committee has been appointed headed by Judge George E. Ramskill, probate and county judge of Osage county.

### *Armstrong Addresses Arkansas Meeting*

The annual fall meeting of the junior section of the Arkansas Bar Association, held Nov. 16, at Little

Rock, provided a rallying point for all younger lawyers in the State, including those affiliated with other junior bar groups. B. Cooper Jacoway, conference chairman for Arkansas, spoke on the junior bar's program for the current year. The principal speaker at the evening banquet was Walter P. Armstrong, Memphis bar leader, long active in the American Bar Association. His subject was "A Confession of Faith." At his suggestion, those in attendance stood a moment in silent tribute to Justice Pierce Butler who had died a day before the meeting.

#### *Arizona Plans*

State chairman for Arizona this year is Phil J. Munch, Phoenix, who has detailed plans for covering the State to arouse activity and enroll new members. Eli Gorodezky, Phoenix, assistant city attorney, has been appointed State director of public information. Mr. Munch has confidently expressed "the hope that Arizona may take its proper place among the junior bar groups" with the cooperation he is receiving from the conference officers and the local men who have agreed to carry out their several assignments.

#### *Arrangements Committee Appointed*

Chairman Hannah has appointed a committee on arrangements for the 1940 annual meeting of the junior bar conference at Philadelphia. The principal functions of the committee are to arrange for the entertainment, transportation, and meeting-place details. The committee will work in close cooperation with the Association headquarters in Chicago and the Association's committee on arrangements.



JOSEPH R. TAYLOR

Who has retired after nineteen years' service as Managing Editor of the AMERICAN BAR ASSOCIATION JOURNAL.

### ANNOUNCEMENT OF 1940 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

#### INFORMATION FOR CONTESTANTS

##### *Subject to be discussed:*

"To What Extent May Courts Under the Rule Making Power Prescribe Rules of Evidence?"

##### *Time when essay must be submitted:*

On or before February 15, 1940.

##### *Amount of Prize:*

Three Thousand Dollars.

##### *Eligibility:*

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with the Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish further information and instructions.

#### A PRIVATE LEGAL INSTITUTE

"For a number of years a group of lawyers from Chicago, New York, and Washington have met regularly to discuss matters of taxation. The group functions somewhat along the line of the radio program sponsored by the University of Chicago. Each member takes one case and digests it thoroughly, sending the other members a memorandum. When the group meets, the one who digested the case leads the discussion of it. Each has a separate matter and in this way the new developments in the field are kept in view. A suggestion has been made that attorneys in Detroit might be interested in organizing a group to function along similar lines."—*Detroit Bar Quarterly*, October, 1939.

# LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

## The "Neighborhood Law Office" Experiment Launched With Some Opposition

Much consideration has been given during the last three or four years to means by which the public may be led to make larger use of the services of lawyers, desirable no doubt from the point of view of both the public and the profession.

The rise and spread of public relations committees in bar associations has had the legal profession's interest primarily in view, but the profession has not been unmindful of its duty to serve the public even without compensation. It is no doubt true that many, if not the majority of lawyers, will not turn away an impecunious person who has a good cause of action or a meritorious defense. But the lawyers who insist that only they shall be permitted to render legal service have for some time recognized that their assertion of this monopolistic claim obliges them as a group to recognize a duty to furnish legal services to those who need it whether able to pay or not, and legal aid organizations have come into existence all over the country. There is now a national organization of such societies. In their operation in various ways they seek to ascertain whether a prospective client is able to pay any attorney's fee. If so, the organization usually refuses its aid, advises the employment of a lawyer and sometimes refers the person refused to a lawyer, or a list of lawyers, who will take the case for the small fee that the person can pay. The spread of such organizations and the existence of their national organization, which studies all manner of questions relating to legal aid, suggests that the plight of the person who needs but can pay nothing for legal service is receiving general and sympathetic consideration.

Of late there has been much discussion of ways of taking care of that supposedly very large class of people needing legal service who cannot pay the ordinary fee but can pay something. Reference has already been made in this column to proposals for establishing organizations to serve such people, sometimes called "legal clinics" or "neighborhood law offices," and attention has been called to some of the opposition thereto.

### *First Tried in Philadelphia*

The National Lawyers Guild appears to have begun the first experiment in an attempt "to bring legal service to families in the lower-income brackets." It recently opened six "neighborhood law offices" in Philadelphia, each of which is staffed by partnerships of from two to six attorneys who will charge minimum fees of \$1. A permanent advisory committee of attorneys, including Dean Herbert F. Goodrich, of the University of Pennsylvania Law School; Francis Fisher Kane, winner of the 1935 Philadelphia Award, and Earl G. Harrison, president of the Pennsylvania Public Charities Association, is observing the experiment.

If successful in Philadelphia, the guild contemplates the opening of similar offices in other cities.

### *Dean Garrison Firmly Supports Plan*

Speaking recently before the Washington Chapter of the National Lawyers Guild, Dean Lloyd K. Garrison, of the University of Wisconsin Law School, formerly chairman of the American Bar Association's Committee on Economic Condition of the Bar and

now vice-president of the Guild, announced plans for the early establishment of a national non-partisan committee, consisting of lawyers, judges and educators, to coordinate plans for expanding the field of legal service in all parts of the country. He called upon members of the bar to be "lawyer statesmen" and to solve the problem of "too many lawyers and too little legal service."

He told the meeting that the real answer to the problem is not in the traditional artificial contraction of the number of lawyers permitted to practice, but in bringing legal service to the great middle-income group, asserting that this fact is coming to be generally recognized.

Pointing out that nearly three-fourths of the nation's population live in cities, he said the legal profession, like other agencies and institutions, must adjust itself to a radically changed environment in which rapid urbanization of society is one of the chief phases. He mentioned the Philadelphia experiment involving the establishment of six neighborhood law offices November 1st as among several attempts to meet the problem of legal service for the middle-income group and also noted that proposals along similar lines were under consideration in Chicago, New York, Minneapolis and San Francisco. He described the Philadelphia plan, which he was disposed to regard as an apparently effective means of expanding legal services, as unique in that clients would pay \$1 for consultations of a half hour or less, \$4 and up for drafting of wills, deeds, and similar documents, and from \$15 up for representation in suits.

### *Some Lawyers Voice Opposition*

But such proposals are not without opposition. The *Philadelphia Legal Intelligencer* recently printed a letter that expressed a view that is typical of many individual lawyers. In part, it said:

"These 'Neighborhood Law Offices' are, in reality, private law partnerships enjoying an unethical mode of securing contacts and business. Their advertising program and 'bargain rate' policy violate every principle of fair and ethical practice.

"At the present time, the legal practitioner, in addition to being in competition with fellow practitioners attempting to earn their living, is also in competition with the Legal Aid Society and other so-called public legal agencies, as well as with the Public Defender. These agencies, at this time, are giving legal service without charge to people who can well afford to pay a small fee therefor, even going to the extent of handling divorce cases which are certainly not in their line, and causing post cards to be mailed soliciting workmen's compensation cases. In many of the cases referred to the Public Defender, the legal practitioner would be willing to accept a small fee or even a promise of a small fee to be paid at a later date. These opportunities are thus lost to the general practitioner. In fairness to the present defenders, it must be admitted that they are exercising every reasonable precaution against accepting cases from persons who might be able to employ private counsel. The present incumbents of the office are doing excellent work in a modest manner, without any thought of advertising or selfish gain. However, the bar cannot always be sure that men of equal caliber will always hold the office.

"I certainly think that it is about time that the bar associations attempted to do something to protect those members of the bar who have been striving for years to

develop a practice from which they might earn a livelihood, and most of the members of the bar have had to make use of their neighborhood friends and associations to try to develop such a practice. To authorize these 'Neighborhood Law Offices' to operate in the manner permitted will only result in hardship and unfair competition to those attorneys who have heretofore depended solely on their neighborhood business for sustenance.

"Those few attorneys who are known as corporation attorneys, and who represent the banking and corporate interests, as well as clients of a caliber who can afford to and who do pay fees commensurate with their financial status, are not affected by any of the practices complained of. The average practitioner, however, has had a terrific struggle to earn a bare living, and the solicitation of cases by the agencies giving free legal service has hurt considerably.

"I, for one, certainly feel that if the bar association would devote more time to suppressing illegal practice of law by those who have no authority so to do, more good would be accomplished than by soliciting free clients for limited groups, or clients for limited groups on the theory that they are to receive bargain rates, whereas, in truth, the general legal practitioner, on the average, renders a cheaper-costing service to clients. By advertising the so-called 'bargain rates,' the average person must necessarily believe that to consult an attorney not in the 'Neighborhood Law Office' group is a costly proposition, which, of course, is 100 per cent erroneous."

#### *Chicago Bar Association and the Polish Lawyers*

In this column, reference was recently made to the recommendation of a committee of the Chicago Bar Association that the Association set up a reference plan to assist prospective clients in finding lawyers and ultimately that the association set up a law office to serve people of small means in matters which lawyers in private practice cannot handle profitably.

This proposal was recently attacked in a resolution passed by the Polish Lawyers' Association of Chicago. Justifying its contention that both parts of the plan are founded on false premises, the resolution says:

"(a) That it not only is not difficult to find a specialist when required, but the occasions when a specialist is needed are so rare, at least in the classes of clients concerned, as not to present any problem whatever.

"(b) That a large percentage of lawyers in this county not only can well afford, but would welcome the opportunity, to handle most of the legal business which the Chicago Bar Association calls 'not profitable.'"

Other objections to the plan were listed in the Polish lawyers' resolution as follows:

"That in both types of legal matters, that is, those that do not actually require specialists, and the rare ones that do, the lawyer for the prospective client to retain in the first instance is the practitioner who takes an active interest in the civic life of the neighborhood or community where the client resides.

"That the list of lawyers, both specialists and general practitioners, to whom clients would be referred under the 'Reference Plan' is limited to members of the Chicago Bar Association.

"That the 'Reference Plan' would inevitably become subject to the abuse of favoritism, because the degrees of qualification of lawyers in each specialty naturally would vary, and consideration thereof necessarily would be given in making assignments.

"That both parts of the plan would effect a diversion of legal business from the lawyers in the community to whom the client would soon, and properly, come were the plans not in operation.

"That the proper personal, fiduciary relation between lawyer and client would be impossible to preserve.

"That even 'dignified' advertising is still advertising and in violation of all canons of professional ethics.

"That the difficulties of determining which clients are 'of small means', and thus eligible at the bar association law office, would be so great that a vast class of 'bargain-hunting' clients would soon be tempted to claim having small means, since the office would rapidly gain in popularity with the lay public, and thus legal business of all kinds, even including presently 'profitable' business, would be diverted to the office.

"That the ultimate result would be that the office would compete with the private practitioners and the average earnings of all lawyers would be lower than they are now.

"That the plans proposed would thus, and in other ways, create new problems much more serious from the standpoint of both the public and the lawyers than any problems that may now exist.

"That the bar association law office would be a stepping stone to socialism in the legal profession."

#### *A Problem for the Profession*

The Committee on Professional Ethics and Grievances has received enough inquiry from individual lawyers and law firms, who desire in some special degree to serve the low-income group, to suggest that the profession must now determine the conditions upon which such ventures shall be approved.

#### **A New Form of Solicitation Condemned**

A law firm that defended suits for an insurance company prepared a table showing the results of its work. In each case, it showed the settlement demand or the *ad damnum*, the actual result obtained in settlement or by suit, the fee charged and any other expense involved. The table was given considerable circulation among prospective or possible insurance company clients.

The Committee on Professional Ethics and Grievances was asked whether this action was ethically proper. It viewed the firm's sole purpose to be the procurement of employment and what it did clearly within the condemnation of Canon 27.

#### **Do the Present Canons Adequately Cover Practice Before Administrative Tribunals?**

The suggestion was recently made at the annual bar association meeting of a prominent state that a special set of canons of ethics should be framed to apply to persons who compose administrative tribunals and those who practice before them, analogous to the Canons of Judicial and Professional Ethics that now apply to judges and lawyers. The suggestion was communicated to the Committee on Professional Ethics and Grievances. It now has it under consideration, not yet having determined how far the present canons are inadequate. It welcomes suggestions from the profession. How often have lawyers observed behavior that seemed improper, that probably would not have occurred in a court where judge and lawyer acknowledged the authority of the canons? To what extent does the fact that members of administrative tribunals and those who practice before them are not required to be and often are not lawyers present a difficulty? Suggestions may be directed to the chairman, Post Office Building, Columbus, Ohio.

#### **COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,**

H. W. ARANT, *Chairman.*

OPINION 196  
(October 20, 1939)

**ATTORNEY'S EXPENSES — COMMISSIONS—**  
It is improper for a lawyer to retain, pursuant to arrangement with an abstract company, one-fourth the charge for an abstract, made by it for his client, as commission for bringing it the business, unless such retention is with the knowledge and consent of the client after full disclosure.

The Committee has been asked to express its opinion as to the propriety of an arrangement whereby, when a lawyer has an abstract of title made for his client by an abstract company, he bills his client for the full charge made for the abstract, and, upon collection of same, pursuant to an understanding with the abstract company, remits it only three-fourths of the charge, retaining the balance as a commission for bringing business to the abstract company.

The opinion of the Committee was stated by MR. MILLER, Messrs. Phillips, Arant, Houghton, Brown, Drinker and Taft concurring.

Canon 38 provides: "A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure."

The statement submitted does not expressly state, but clearly implies, that the arrangement was carried out by the lawyer without the knowledge or consent of his client. Obviously, the arrangement violates the express provisions of Canon 38, unless the lawyer's commission is retained with the knowledge and consent of the client after full disclosure.

OPINION 197  
(October 21, 1939)

**SOLICITATION — SEEKING PROFESSIONAL EMPLOYMENT FROM GOVERNMENTAL AGENCY—**  
It is not improper for a lawyer directly or through others to seek employment from a governmental agency such as the Home Owners Loan Corporation.

A member of the Association asked:

(a) Whether, "in view of the rather widespread practice of attorneys seeking legal business on a fee basis rather than direct employment on a salary from the Home Owners Loan Corporation, some exception may have been held to exist in soliciting business from a federal agency."

(b) Whether solicitations may be properly made for the professional employment of a lawyer by Home Owners Loan Corporation or other governmental agency by "some one or more members of Congress or other public officials in behalf of an attorney whom they recommend as competent to attend to legal business which the Corporation may have."

The opinion of the Committee was stated by MR. HOUGHTON, Messrs. Phillips, Arant, Miller, Brown, Taft and Drinker concurring.

Canon 27 forbids solicitation of professional employment by circulars, advertisement, personal communications or interviews not warranted by personal relations.

Opinion 7 concerns a case of solicitation which was warranted by personal relations between an attorney and the members of the Osage Tribe of Indians. The attorney had represented the tribe in legal matters for many years, had served its individual members many times, was well known to all of them, and had done

valuable work for them. His conduct in sending letters to members of the tribe asking for future employment was held to be justified by personal relations.

In Opinion 74 it was held that seeking election or appointment to public office (solicitor for municipal corporation) which could be held only by a lawyer was not solicitation of professional employment under Canon 27. The appointment in that case was to be made by the mayor or by the city commission.

Opinion 79 condemned the publication of an advertisement: "Assistant General Counsel of large corporation desires new position of similar character." Other opinions discuss the question of what constitutes solicitation.

We think it clear that a lawyer's seeking employment in an ordinary law office, or appointment to a civil service position, is not prohibited by the Canon.

The Home Owners Loan Corporation is a governmental instrumentality and its attorneys, while not technically public officers, are really in the public service. We are of the opinion that the Canon was not intended to prohibit an attorney from applying to such an agency for employment. As stated in Opinion 74, what is sought in such a case is not professional employment, but appointment to a position in the nature of a public office, which can be held only by a lawyer.

If a lawyer may seek such employment without violating the Canon, in our opinion it is proper for any person to recommend him for such employment.

OPINION 198  
(October 21, 1939)

**EMPLOYMENT—A lawyer may properly accept employment to represent an insurance company, when such employment is tendered by an insurance adjustment corporation authorized to employ counsel for the insurance company, if the adjustment corporation is not engaged in the unauthorized practice of law and the lawyer's employment conforms with the provisions of Canon 35. The fact that the adjustment corporation solicits the business of adjusting claims does not in itself make the lawyer's employment improper unless the circumstances are such that the solicitation of the adjustment business constitutes indirect solicitation of professional employment for the lawyer.**

**OPINIONS—Opinion 96 Clarified.**

A member of the Association has suggested that this Committee's Opinion 96 cannot be reconciled with Canons 35 and 47 and the "Statement of Principles in Reference to Collection Agencies" promulgated by the Committee on Unauthorized Practice of the Law in 1937. Therefore this Committee has been requested to render an opinion which will clarify the situation.

The opinion of the Committee was stated by MR. BROWN, Messrs. Phillips, Arant, Houghton, Miller, Drinker and Taft concurring.

Opinion 96 was rendered on May 2, 1933, and its headnote reads as follows:

"EMPLOYMENT—It is proper for a lawyer to accept employment to represent insurance companies when such employment is tendered by a corporation which solicits insurance claim adjustment business."

Canon 35 reads as follows:<sup>1</sup>

1. When Opinion 96 was rendered Canon 35 contained the following additional paragraph: "The established custom of receiving commercial collections through a lay agency is not

"The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

"A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."

At the 1937 Annual Meeting of the Association, the Committee on Unauthorized Practice of the Law reported a "Statement of Principles in Reference to Collection Agencies" from which the following is an excerpt:

"It is improper for a collection agency:

"(1) To furnish legal advice or to perform legal services or to represent that it is competent to do so; or to institute judicial proceedings on behalf of other persons.

"(2) To communicate with debtors in the name of an attorney or upon the stationery of an attorney; or to prepare any form of instrument which only attorneys are authorized to prepare.

"(3) To solicit and receive assignments of commercial claims for the purpose of suit thereon.

"(4) In dealing with debtors to employ instruments simulating forms of judicial process, or forms of notice pertaining to judicial proceedings, or to threaten the commencement of such proceedings.

"(5) To solicit claims for the purpose of having any legal action or court proceeding instituted thereon, or to solicit claims for any purpose at the instigation of any attorney.

"(6) To assume authority on behalf of creditors to employ or terminate the services of an attorney or to arrange the terms of compensation for such services.

"(7) To intervene between creditor and attorney in any manner which would control or exploit the services of the attorney or which would direct those services in the interest of the agency.

"(8) To demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting a claim, irrespective of whether or not the agency may have previously attempted collection thereof." 62 A.B.A. Rep. 786, 775.

At the same meeting there was adopted Canon 47 reading as follows:

"No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

#### *The Application of Canon 47*

What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction. Whether or not a lay adjuster is engaged in the unauthorized practice

condemned hereby." This language was deleted by amendment at the 1933 meeting of the Association. However, the circumstances under which the amendment was made disclose that it was not the purpose of the Association to prohibit the receipt of commercial claims from a lay forwarder. The language was deemed unnecessary in Canon 35 in view of the amendment then being made to Canon 34. See 58 A.B.A. Rep. 176, 161 *et seq.* At the 1937 annual meeting, Canon 34 was amended so as to withdraw the previous sanction for a division of fees for legal services with a lay forwarder of commercial collections. See 62 A.B.A. Rep. 351 *et seq.* and 761 *et seq.*

of the law will ordinarily depend upon the nature of his activities. Recent decisions covering the subject are cited in the reports of the Committee on Unauthorized Practice of the Law for 1937 and 1938. See 62 A.B.A. Rep. 733 and 63 A.B.A. Rep. 326.

This Committee can only say that if the lawyer knows, or has substantial grounds for believing, that the lay adjuster is engaged in activities which constitute the unauthorized practice of the law, Canon 47 requires that the lawyer refuse employment tendered through the adjuster.

It may be said that Opinion 96 specifically presents the question as to whether the selection of an attorney by the lay adjuster constitutes unauthorized practice of the law. Subject to the reservation that a different rule may be recognized in a particular jurisdiction, and the further reservation that it is not the function of this Committee to determine such questions, it is the understanding of this Committee that, generally speaking, it is not illegal for a lay adjuster to select a lawyer to act for an insurance company in handling a claim, if the adjuster has been specifically authorized to do so by the insurance company. However, the adjuster cannot assume such authority as an incident of his employment. The following is quoted from *State of Missouri v. Dudley* (Mo.), 102 S. W. (2d) 895:

"As a general proposition there is no doubt that an agent may be appointed to select an attorney to represent the principal, but where this is done it is essential that the attorney so employed must represent the principal and not the agent."

Also see *State v. Lytton* (Tenn.), 110 S. W. (2d) 313.

If the activities of the adjustment corporation do not constitute the unauthorized practice of law, the mere fact that it solicits business does not make it improper for the lawyer to accept employment to represent the insurance company. Of course it is assumed that the adjustment corporation does not exploit the services of lawyers and that there is no connection between the agency and the lawyer which would make its solicitation an indirect solicitation for the lawyer. See Opinion 35.

#### *The Application of Canon 35*

The terms of the employment of the lawyer, as well as the actual practice in handling the claim, must conform to the requirements of Canon 35. The lawyer must represent the insurance company and not the lay adjuster. At most the adjuster is merely the means through which the insurance company employs the lawyer. The responsibility of the lawyer must be to the principal and he must look to the principal for his compensation. His services must be free from the control of the lay adjuster. He must be allowed to communicate directly with, and obtain his instructions directly from, the insurance company when he so desires. Generally speaking, copies of all correspondence with the lay adjuster should be forwarded to the insurance company.

"We saw how the Romans . . . when they came to deal with enemies which placed their felicity only in liberty and the sharpness of their swords, and had the natural elemental advantages of bogs and woods and hardness of bodies, they ever found they had their hands full of them." (Francis Bacon, about 1598.)

## AMERICAN BAR ASSOCIATION JOURNAL

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### JOSEPH R. TAYLOR LEAVES US

Joseph R. Taylor has resigned after more than nineteen years of service as managing editor of the JOURNAL. His associates feel great regret at the severing of long and most pleasant associations.

Mr. Taylor was in that responsible place almost from the very beginning of the JOURNAL in its present form as a monthly. He served for a part of the too brief editorship of Stephen S. Gregory and for the whole term of the present editor-in-chief, and his influence on the magazine grew greater from year to year.

He brought to our work the education of a lawyer and a wealth of experience in practical newspaper work. There is a temptation to account, at least in part, for his deep love of literature, especially poetry, by his succession after an interval to the editorial writer's chair that had been occupied at the office of the New Orleans *Times Democrat* by Lafcadio Hearn. Mr. Taylor read the best things, and he wrote with force and distinction. It is rare to find the practical and the cultural so admirably united.

The choice of Mr. Taylor as managing editor of the JOURNAL was a success from the beginning. The things required for everyday life were there, of course,—diligence, painstaking carefulness, competence, good judgment, moral standards, fairness. But above all and beyond all these were qualities that are never seen at a glance, in the routine of the day's work, but are brought out only by times of stress, by the working of men under pressure, by great changes, where all that has gone before must be re-examined in a new light. Joseph Taylor appeared to be at the top point of efficiency as the directing officer of the official

publication of the American Bar Association when the Association's scheme of existence was changed fundamentally, a federative and representative plan being put in place of the old arrangement, which was the town meeting writ large and now inadequate to cope with the problems of great distances and great numbers.

Mr. Taylor rose to the occasion instantly. The JOURNAL did not wait for a slow adaptation of its point of view to the new order of things. It assumed a lead that no one has challenged. There was a new life in its veins, a rebirth that the proponents of the new plan had scarcely ventured to hope for. The JOURNAL changed its very appearance. It looked different, and it was different. Many have participated in that result and there is glory enough for all, but in the transition to the new American Bar Association the contribution of the JOURNAL cannot be separated from the work of its managing editor. All can be summed up by saying that to the high professional ideals which governed his life and work he was now seen to have brought the rare intellectual gift which we call genius.

We shall miss his figure from our circle. At annual meetings unhurried, imperturbable, philosophical; at all times rich in his stores of the world's great prose and poetry; companionable, loyal, clear-sighted, self-effacing, he will often come into the thoughts of his old associates and friends. All of them wish for him long and happy, busy and useful days in the South from which we drew him, and to which he now returns home.

There is authority for the statement that Mr. Taylor's favorite character in literature is Ulysses, the god-like man for whom the great adventure of life would never end, except with life itself. It was foretold that some day, as the years went on, the much-enduring man would meet a stranger with an oar on his shoulder. With him Ulysses was to fare forth, leaving all the settled things of life, to undertake new toils and perils. If such a stranger shall appear, we should not be surprised to learn that our friend and his congenial wife have gone along for new adventures in living.

### COURT ROOM AND LAW OFFICE

A learned correspondent, Hon. Pierre Crabitès, formerly a judge of the Mixed Tribunal at Cairo, Egypt, and now a professor in the law school of Louisiana State University, makes an interesting suggestion which is not exactly new, but which has not been so fully developed before. It has to do with the traditional English division of

the legal profession into barristers and solicitors. (We may note that the advantages and disadvantages of such a plan, as applied to the United States, were the subject of the second Ross Essay). Judge Crabitès' argument runs along these lines: In this country since the middle of the last century the solicitor has largely replaced the barrister. "Office work" nets far more and larger fees than "court work." Now the oath for lawyers recommended by the American Bar Association is, by its terms, exclusively concerned with court work; our canons of ethics also, except for the general summing-up in canon 32, have to do only with court work. These canons are thoroughly English; they contemplate only the barrister. We have imported a plant without its soil or its atmosphere, and have grafted it on a stock that is extraneous to it.

The English barrister, Judge Crabitès goes on to say, must take cases as they come; in the famous phrase, he is "a cabman in the rank, bound to answer the first hail." It was different in the Roman law—"the advocate will not undertake the defense of every one, nor will he throw open the harbor of his eloquence as a port of refuge to pirates." This is also the modern French view. Judge Crabitès attributes the different standards, in bars both derived from the Roman law, to the difference in the method of selecting judges. In France, judges are not chosen from the bar, but are specially trained for the bench; in England, only barristers may become judges. Clearly, under the English system, if upon every vacancy an inquiry had to be made as to the affiliations of the persons being considered for appointment, to ascertain what kind of clients they had chosen to accept, a very difficult situation would be created. Each lawyer would be taken to guarantee the moral qualities of the clients whose business he had accepted, and to have made their causes his own. This would be intolerable. These two countries have met the difficulty in different ways, France by choosing her judges from a class specially trained for that field, not from lawyers who have had clients; England by a system which definitely takes away from the lawyer any choice of clients or causes. The adverse conclusion drawn from the sort of clients a lawyer has had, will not arise. The prospective judge cannot be called on to explain why he accepted every case on his docket.

In the United States we have neither the French nor the English system, and an-

other problem arises. The American lawyer of former days lived in a glass-house. His principal professional duties were in open court, where everybody saw him in action, and could estimate his ability and also his character. In the days of the "office lawyer" this is not so. "The deduction which flows from these premises," says Judge Crabitès, "is that lawyers who are now named to the bench have not as a rule, at the time of their appointment [or election], that impregnable place in the confidence of public opinion which was enjoyed by their 'glass-house' predecessors," and he thinks some of the blame must be given to the defects in the standards set up by the oath and the canons. "It is deplorable," he says, "that the letter of the oath recommended by the highest exponent of the American legal profession should treat with complacent indifference that aspect of a lawyer's activity which today dominates his practice," and that our canons of ethics should repeat this serious error of omission.

Sometimes the evil in a system withers away when the light of public attention is focused upon it. Our correspondent invites criticism and discussion. The point seems to be one worth considering.

#### ADVISORY COMMITTEE CARRIES ON

When the Supreme Court of the United States in June, 1935, announced that a group had been chosen from the bar to serve as an advisory committee in the drafting of rules of civil procedure in the federal courts, under the grant by Congress of the rule-making power, it was the general hope that these distinguished lawyers had been enlisted "for the duration of the war." One of the strongest arguments for vesting this power in the Courts, rather than in the legislative branch, is that the exercise of the power by the courts is more flexible and adaptable, and amendment more easy. Constant vigilance is required to keep the rules up to their allotted work of making it easier for the courts to do justice between parties. It is therefore gratifying to note the entry of this order by the Supreme Court on November 6, 1939:

IT IS ORDERED that the members of the Advisory Committee appointed by Orders of June 3, 1935, and February 17, 1936, to assist the Court in the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, or so many of such members as are willing to serve, be requested to prepare and submit to the Court such amendments as they may deem advisable to the Rules of Civil Procedure adopted by the Court and reported to Congress by the Attorney General on January 3, 1938.

Thus the good work will go on.

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

**T**HE *President as Administrative Chief*, by Edward S. Corwin, reprinted from the *Journal of Politics*, Vol. I, No. 1, Feb. 1939.—Written with the wealth of scholarship that we have come to expect from the work of Professor Corwin, this article constitutes a chapter out of his forthcoming book, *"The President, His Powers and Prerogatives."* The subject matter of the article deals with the "powers of appointment, supervision, and removal," which the President "enjoys in relation to his official subordinates." The author is duly observant of historical evolution. But, as might be inferred from the title which the book is to bear, his discussion is confined almost entirely to legal considerations. "Powers and prerogatives" are terms that connote the legal aspects of the Presidency. From this standpoint, the account of the President as administrative chief is admirable. The powers of appointment, supervision, and removal, are described with ample documentation and judicious fair-mindedness. But it may be asked whether such problems can be adequately treated from a legal point of view alone. Can even the legal aspects be properly considered in isolation from the political and administrative context? The result of failing to interpret the President's legal position in the light of his political and executive leadership is to leave the reader only half-satisfied.

It may seem unreasonable to criticize Professor Corwin for omitting to include what some might regard as a different topic. Surely, however, the legal aspect of the Presidency cannot properly be severed from the exigencies of politics and of public management. As is amply shown in this article, widely divergent views have been held, and continue to be held, about the constitutional scope of the President's authority. Broad and narrow constructions have been offered according to the predilections of those who favoured Congress or the Executive. Such conflict is made possible—nay, is invited—by the vagueness and generality in Article 2 of the Constitution. Hence, the fundamental law must be supplemented by our conception of the political and administrative role which the President ought to play in the Federal Government. Consider the moot question of how much power the President should exercise over agencies such as the Tennessee Valley Authority, the Interstate Commerce Commission, or the Civil Service Commission. Legal arguments of some plausibility can be advanced on either side. It can be claimed that the functions of such agencies are "quasi-legislative" or "quasi-judicial," and hence immune from Presidential interference because of a sacrosanct separation of powers. Or it can be argued that their functions are largely executive and impinge on the policies of executive departments, and therefore must be subject to the jurisdiction of the Chief Executive. A discussion so commenced will soon lose itself in a bog of political metaphysics and terminological subtleties.

Surely, the sound approach is to consider the political and administrative consequences that will flow from leaving such agencies independent of the President or from subordinating them to his control. Must there not be an ultimate unity of control to guarantee harmonious operations within the executive branch? Or is an over-concentration of power likely to be dangerous? In the light of such factors must our choice be made between the opposing legal interpretations.

To be fair to Professor Corwin, there are passages where he conducts his argument in this manner. Thus, he criticises "President Roosevelt's plan to reorganize the executive branch of the government" partly on constitutional grounds, partly on grounds of administrative desirability. It is only to be regretted that he does not employ the same treatment elsewhere, as for instance in his discussion of the removal power and especially of the Myers and Rathbun cases.

LESLIE LIPSON

University of New Zealand.

*Income Taxes in the British Dominions.* 2nd ed., Supplement No. 4, May, 1938. London: H.M. Stationery Office; for sale at British Library of information, New York. Pp. 904, cxlviii.—This officially published digest of laws imposing incomes taxes and cognate taxes in the British dominions, colonies, and protectorates is to be used, of course, in connection with the principal volume and previous supplements. Its substantial bulk is a reminder not only of the extent of British dominions and possessions, but also of the constant changes that are being made in tax laws everywhere.

M.

*Evidence Before International Tribunals*, by Durwald V. Sandifer. 1939. Chicago: The Foundation Press, Inc. 443 pp.—This valuable contribution to the study of comparative law integrates in one volume a mass of useful data in a field of adjective law to which little attention has hitherto been paid by American writers. The quality of this book was well-nigh guaranteed by the competence, training, and experience of the author and his opportunity as an assistant to the legal adviser of the Department of State to obtain relatively inaccessible materials. Its usefulness will doubtless be greatest in the hands of attorneys, governments, and tribunals dealing with the technical problems examined. The work is a valuable addition to the literature of comparative law and of the philosophy of law.

In his analysis of the rules applied by international tribunals the author compares or contrasts the Anglo-American and civil law rules. International practice bears more resemblance, in its preponderant character-

istics, to civil law procedure than to Anglo-American, although international tribunals have adopted the rules best suited to its needs in preference to indulging in a conscious choice of rules taken from any particular system of law.

The most distinctive rule of practice before international tribunals, that of permitting parties to present practically any evidence they see fit, free from exclusionary inhibitions, is characteristic of the civil law. The absence of juries and the fact that the parties before international tribunals are sovereign States were factors in determining the adoption of this rule. Other ways in which international judicial procedure parallels civil law procedure are the preponderant reliance upon written evidence and the sparing use of direct oral evidence, in the admission of hearsay, and the rules concerning the burden of proof, the production of evidence, the taking of testimonial evidence, and the use of experts and expert inquiries.

The author considers the adoption of the affidavit the most significant contribution of Anglo-American procedure to the law of evidence in international judicial procedure. He states that "although the affidavit as an instrument of proof has clearly been derived from Anglo-American law it might be said with accuracy that if such a procedure for presenting evidence had not existed it would have had to be devised in order to meet the needs of international judicial procedure." International tribunals have also adopted the "best evidence" rule and the rules of judicial notice, characteristic of Anglo-American law. The practice before international tribunals of permitting the parties to present any evidence they see fit originated in the Anglo-American practice of the free evaluation of evidence by the jury.

If Mr. Sandifer had not published his treatise until today he might have been impelled to enrich the comparative law aspect of his study by pointing out the rules of evidence adopted by various administrative agencies. It is believed that the rules adopted by such agencies resemble more nearly the rules applied by international tribunals than those applied by common law courts. This is certainly true in the case of the rules of evidence adopted by tariff boards and commissions in various countries. The reasons which have impelled international tribunals to permit the presentation of evidence free from rules of exclusion apply to tariff commissions and to many other administrative agencies,—freedom from jury trial and representation of the interests of the Government. However, the reviewer hesitates to suggest an added assignment, even though hypothetical, to an author whose research labors and accomplishments, already impressive, have enabled him to fulfill so admirably his own objectives.

LAWRENCE DEEMS EGBERT

Washington, D. C.

*Does Distribution Cost Too Much? A Review of the Costs Involved in Current Marketing Methods and a Program for Improvement.* Factual findings by Paul W. Stewart and J. Frederic Dewhurst with the assistance of Louise Field. A program for action by the Committee on Distribution of the Twentieth Century Fund. 1939. New York. 420 pages, appendix and index.—The purpose of this work, according to the foreword by the executive director of the Fund, is to furnish the country with an accurate over-all picture and an appraisal of the distribution system as a whole, together with a program for making the system more

efficient from the viewpoint of the general public. The book is consequently an ambitious work. It compares most favorably with previous studies of The Twentieth Century Fund, and in particular with its *Study in Current Tax Problems* (1937).

In consonance with its described purpose the work is divided into a factual finding of 330 pages and a program of recommended action of 34 pages. From the factual finding the conclusion is made that it costs more to distribute goods than it does to make them, with more than half of all our gainfully occupied workers being engaged in distributing or servicing commodities, the other half producing. The reasons for this would appear to be the massing and specialization of production and the widening of the geographical area to be served with a mass distribution system being built up to match the mass production system of our times. The necessity for middlemen in our economy is pointed out and while it is found that the cost of wholesaling and jobbing is high, it is thought to be not excessive for the service that must be rendered.

An analysis is made of various types of retail outlets, and the comparative merits of chains, co-operatives, supermarkets, independents, and voluntary chains are pointed out in a fresh unbiased survey that should prove of distinct interest to those following chain store taxation. After a consideration of the part played by advertising and facilitating agencies in the cost of distribution, a brief but excellent review is had of legislation in the field of distribution.

Starting out with the observation (that might well be a truism) that particular groups become effective in politics to the degree that they lose their effectiveness in business, the philosophy behind, and the growth and content of, regulatory legislation in the distributing field is studied, consideration being given to anti-trust laws, fair trade acts, resale price maintenance laws, and the increasingly prominent state laws operating as barriers to interstate trade. If any justification for the existence of this book is necessary in the eyes of the legal profession, it is amply furnished by this chapter. The most serious criticism to be made against it is its unfortunate brevity.

In the summary, the title question is answered in the affirmative, but care is taken to emphasize the fact that this is not due to excessive profits, but to inefficiency, ignorance on the part of both distributors and consumers, and duplication.

The book concludes with recommendations that the consumer be given more information with respect to services, the charge for which is included in the price of merchandise, such as return privileges, credit, and delivery, so that, if he so desires, the purchaser may buy without receiving or paying for them; that more public and private testing and appraising organizations be established to inform consumers of the quality of merchandise, is suggested; stricter laws with respect to the labeling and advertising of merchandise are sought, and consumer cooperatives are encouraged. With respect to distributors, it is thought desirable to improve cost accounting and analysis of the distributing field; greater specialized education is sought through governmental research bureaus and through high school and college education in this field. From the statutory viewpoint, not only is the repeal of chain store legislation thought desirable but all legislation which seeks to preserve or destroy some special group without consideration of the public interest is condemned. The

strengthening of existing laws checking private monopoly and price fixing are recommended.

The work exemplified by this book is of the type that should be welcomed and encouraged. It does much to clarify ideas and dispel misconceptions on many highly controversial issues of the day. Unbiased research is necessary for the foundation of the requisite knowledge for the intelligent drafting of statutes by our legislators and for the intelligent construction of statutes by our courts. In the field of distribution it has been furnished by this study.

J. EDWARD COLLINS

Catholic University of America.

*Symbols and Swords: The Technique of Sovereignty*, by James Marshall. New York: Oxford University Press. 168 pages.—The author of this essay is a New York lawyer, the president of the New York board of education, and a practical as well as theoretical student of political ideas and processes. The questions he deals with are by no means new, but he discusses them in a fresh, independent, and realistic way. He is familiar with the literature on the subject of sovereignty, and he has thought much about the developments of the past several decades in Europe and America, developments that have played havoc with metaphysical notions and cherished dogmas.

The conclusions of the volume will not be accepted by the average conservative, but they will challenge attention and provoke fruitful debate.

What is sovereignty? How does the sovereign compel obedience—by force, or by slogans and propaganda, or by both? How are sovereigns overthrown? In republics and democracies the people are supposed to be sovereign, but do the people actually govern themselves? How are conflicts of interest and of principles reconciled and adjusted? Are minorities bound to bow to the will of the majority? If so, why? Do constitutional safeguards effectively shackle an intolerant and despotic majority? If not, what more can we do to protect the rights and the vital claims of minorities?

It will be seen that these burning questions demand sober and candid treatment at our hands. Mr. Marshall is sober and candid in his analysis and attempted solutions. He is not radical; he rejects the theory of divided sovereignty, and he finds little substance or merit in the Marx-Engels-Levin affirmation that communism, by abolishing classes and the class struggle, will render the State superfluous and cause it to fade or wither away. Society needs organization and instrumentalities. Anarchism is a dream of Utopians, old and new. Power must be lodged somewhere, and abuse of power must be foreseen and reduced to a minimum. Human needs must be satisfied, and social peace can be assured only by social justice and reasonable, fair, and civilized governmental policies.

Democracy is more than machinery, more than political method. It has an economic aspect, and its essence is equality of opportunity and approximate equality of living standards and living conditions. At a certain point, inequality spells revolution and social disintegration.

A new world order is emerging. Ours is a period of transition and of pain, struggle, and suffering. What is the new order to mean to the masses? How will it guarantee peace and tranquillity, co-operation and progress? Mr. Marshall faces these problems and offers us non-dogmatic, tentative solutions.

Chicago

VICTOR S. YARROS

*Copyright Law Symposium*. (The Nathan Burkan Memorial Competition). 1939. Pp. 195.—This book is a result of a competition in the writing of essays on copyright conducted among the graduating classes of some forty law schools. The dean of each school arranged for the selection of the best essay written at his school and the author was rewarded with a prize. A committee appointed by the American Bar Association then selected the five best from among the prize-winning essays. These five essays constitute the contents of this book. The entire proceeding was conducted at the expense and under the auspices of the American Society of Composers, Authors and Publishers, commonly known as ASCAP. Copies of the book may be obtained on application to the Society.

All the essays are concerned primarily with musical copyright. None of them will ever be read for amusement, but they all give evidence of painstaking and extensive research. They can be recommended as likely to be of assistance to anyone who has occasion to prepare a brief or opinion on any of the subjects with which they deal.

There is a more generalized criticism which applies not merely to these essays but to most of the recent literature in the field of copyright law. This is the absence of any consideration of public policy. There are two reasons which call for such a consideration. One is the tremendous growth in recent years in the field of copyright law—a growth which is working a complete change in the basic conceptions of copyright. The other is the fact that the ordinary protections of patent law are absent in copyright. No investigation precedes the granting of a copyright. The object copyrighted does not have to be original as to all the world. It is theoretically possible, for example, to have two valid copyrights of the same piece of music in existence at the same time.

These essays, like most writing in the field, concern themselves with the new rights which individuals are constantly acquiring under the guise of copyright. There is no recognition that considerations of public policy apply to copyright as well as to other forms of lawful monopoly. The omission is the more unfortunate since the activities of several state legislatures in the past few years indicate that the present copyright situation is arousing considerable popular antagonism.

KENNETH B. UMBREIT

New York City

*Adventuring in Adoption*, by Lee M. Brooks and Evelyn C. Brooks. 1939. Chapel Hill: The University of North Carolina Press. Pp. 225.—Without in any way disparaging the scholarly character of this book it is only fair to the authors and to the reader to point out that it is primarily the enthusiastic sharing of the happy results of a great personal experience and adventure. The initial incentive for the book was to extend to others the Brooks' own discoveries as adoptive parents; hence it is written primarily for adoptive parents, social workers, and other professions dealing with children. With this purpose in mind the authors set down many of the conclusions from their own experience and from their wide reading as a guide to those who may be considering the question of adoption, as a means of allaying their fears, destroying certain folk superstitions, and indicating the proper steps (other than legal) to be taken for integrating an adopted child into its new family. Questions of hered-

ity, necessary qualities and characteristics of the adoptive parents, standards of living, costs, and the like are covered. The second part of the book is devoted largely to a general discussion of the problem of adoption, its 'jural sociology' so to speak, including the agencies for child care, a digest of adoption statutes, and a summary of important researches into the field of foster care of children. American statutes for all the states and territories down to 1938 are analyzed. Standard forms of petitions for adoption, interlocutory orders, final decrees, etc., are appended together with an excellent annotated bibliography.

The general point of view of these happy propagandists may be indicated by the following quotations: "Efficient parenthood is primarily sociological rather than biological. . . . Probably no greater risk is taken in adopting a child than in propagating one's own. . . . The child must be allowed to grow according to his powers in the direction of the goal that is best for him. . . . Parenthood is no more a panacea for a disappointing marriage than marriage is a cure for a personality at war with itself."

The authors warn against the baby bootleggers who, under the veil of secrecy, are really "glib salesmen of babies as well as of household gadgetry." They urge the utmost honesty in dealing with the child and hold that "the surest weapon that can be put into the hand of the child as he faces the world beyond his own door is the knowledge of his adoption." They warn against unwarranted optimism and conclude that there is no basis for the belief that native mental inferiority can be overcome by early adoption or any other treatment. They advise a year's trial residence with the adopters before final decree, whether or not the state has such a statutory requirement.

While every jurisdiction in the United States now requires some form of court procedure in adoption, the legislation varies in its effectiveness, but apparently administration varies even more significantly, and in many states lags behind legislative provisions; hence the authors' conclusion that higher standards for placement, longer and better supervised probation, uniform state laws, and more general agreement in interpretation are self evident and immediate needs, and all depend largely on informed public opinion. Courts and welfare workers are in the main well aware of the situation, but are handicapped not only by over-sized dockets and case loads, but also by the constant pressure of adopters and other interested persons who insist that their case is peculiar and should be made the exception.

In brief, this little book is so packed with authentic fact and so informed with illuminated common sense, that it ought to be read by every lawyer, every social worker, every sociologist, and every parent who may be toying with the idea of adoption.

ARTHUR J. TODD

Northwestern University.

*Ratification of the Twenty-first Amendment to the Constitution of the United States*, by Everett Somerville Brown. 1938. Ann Arbor: University of Michigan Press. Pp. X, 718.—For almost 150 years amendments to the constitution of the United States were proposed by congress to State legislatures for ratification. The alternative method provided for in art. V of the Constitution, that of submitting proposed amendments to State conventions for ratification, was used

for the first time in 1933, when the twenty-first amendment was adopted repealing the prohibition amendment.

The book under review is a painstaking and authoritative collection of the records of the proceedings of the State conventions held in 1933 and of the forty-three State statutes which regulated the calling and holding of the conventions. The statutes are much more interesting than the proceedings of the conventions. The legislatures were confronted with a host of problems, and devised a bewildering variety of solutions. Twenty-one States considered the possibility that congress might enact a statute dealing with State conventions and expressly subordinated their own provisions to those that congress might enact. Others were silent on this point, with the exception of New Mexico which declared any such congressional legislation null and void and a usurpation of States' rights. Some statutes dealt with this particular convention only, others regulated all conventions that might be held in the future to ratify proposed amendments. Some provided for election of delegates by the voters of the State at large, others by districts, and still others by a combination of the two methods. In most of the States, nominations for delegates were made by petitions, but in others they were made by governors, by mass conventions of qualified electors, by nominating committees, boards, or caucuses, and even by the democratic and republican State executive committees. Some statutes fixed the dates of the conventions, others authorized State officials to fix the dates. Different State officials were made presidents and clerks of the conventions. In nearly all of the States provision was made for separate lists of delegates favoring and opposed to repeal; only a few States added provisions for unpledged delegates.

The conventions were not deliberative bodies. Their votes were taken frequently without any discussion, though in a few cases there was a little oratory. The New Hampshire convention lasted 17 minutes, none lasted more than a day.

The author, a professor of political science at the University of Michigan, suggests that the collection of statutes will help in drafting a model uniform law. I should like to add that it will also provide a convenient point of departure for drafting a federal statute covering most of the subject-matter contained in the State statutes and superseding them to that extent. Professor Brown has included brief but useful introductions in which he traces the history of the congressional joint resolution proposing the amendment, discusses some features of the conventions, and compares most of the essential provisions of the statutes with one another.

I share the view of Dean Bates of the Michigan Law School, expressed in his "foreword," that "the conditions of the period in which we live make it certain that there will be more frequent resort to constitutional amendment in the future than in the past, and in this volume there has been gathered in convenient form material indispensable for a study of the amending process." All interested in a rational and effective development of the constitution of the United States should be grateful to Professor Brown for his labor in preparing this volume.

ABRAHAM C. WEINFELD

Washington, D. C.

*International Law and Diplomacy in the Spanish Civil Strife*, by Norman J. Padelford, Professor of International Law, Fletcher School of Law and Diplomacy, 1939. New York: The Macmillan Co. Pp. xxx, 710. Index.—As the author points out in the opening paragraph of his preface, "Insurrections and civil wars in Spain customarily have been productive of international complications. . . . Spanish questions have long been intimately related to the international struggle for power in Europe, and foreign states have intervened in virtually every major civil disturbance in Spain." The recent struggle was no exception to the general rule of foreign intervention there, notwithstanding that the discussions between foreign governments in relation to the conflict and many of their actions which seriously affected the conduct of hostilities in Spain and determined the final outcome were carried on under the guise of "non-intervention." Conclusions of general principles of international law drawn from the attitude of the powers in such a legal paradox may consequently be of limited application. The volume possesses its greatest value as a study in the latest development of the principle of intervention recognized and practiced as a part of the public law of Europe since the Treaties of Westphalia for the purpose of maintaining the balance of power. Professor Padelford clearly appreciated this collocation of his work when he included diplomacy in the title as well as international law.

The first chapter deals with the legal status of the contesting parties. Again the author shows careful discrimination in the use of terms by referring in the title to "civil strife" instead of "civil war," for he finds that neither contestant in Spain was accorded belligerent status. In Chapter II, the interferences by the Spanish "non-belligerents" with foreign shipping through visit and search, the use of automatic contact mines in the sea, aerial bombardment and submarine attacks are described, as well as the attempts of the foreign powers concerned to control such activities. The international non-intervention system is explained in detail in Chapter III, with an account of the efforts to make it operate successfully. "The most that may be said for the system," the author concludes, "is that it probably reduced the total amount of intervention which would have taken place without it, and that it perhaps was instrumental in preventing the civil strife from becoming international war" (p. 120). The relation of the League of Nations to the conflict is given in Chapter IV in which the author concludes that the League did not entirely "fail" but "helped to bring the engulfing dangers of the civil strife within the orbit of collective control" (p. 143). Problems of diplomacy and consular relations with Spain are set out in Chapter V, and the particular problems of the United States are discussed in Chapter VI, special emphasis being here placed on the arms embargo laws of January 8 and May 1, 1937. Chapters VII and VIII deal with the termination of the conflict and contain a summary of the author's conclusions.

The texts of many important documents bearing upon the questions discussed by the author, which he has collected and in most cases translated into English, occupy about two-thirds of the volume. They include, among other material, the successive documents which make up the non-intervention accord and the texts of the measures adopted by the participating governments to give effect to these accords, as well as pertinent documents of the League of Nations and the United States. In view of the ephemeral character of many of

these documents, Professor Padelford has performed a lasting service in making them easily accessible for future use.

The literature of international law and international relations has been enriched by Professor Padelford's well-timed, thorough and scholarly treatment of an episode, the full significance of which cannot now be estimated because of later events to which it may be but a tragic prelude. If, as the author appears to hope, the action of the foreign powers in Spain may be looked upon as a step in evolving a system of collective action for the preservation of international peace (p. 120), such studies as the one under review will be of the greatest aid in a clearer understanding of the complex problems involved, and consequently will be a practical contribution to their ultimate solution.

GEORGE A. FINCH

Washington, D. C.

*The Law and Religion*, by Edwin M. Abbott, 1938. Philadelphia: Dorrance and Co. 92 pp.—The thesis of this little volume is that only in religion will mankind find the way to peace on earth and to a humane civilization. The author is a devout churchman, and in his legal career he has sought and found guidance in the teaching of Christian ethics. He is no cynic and no pessimist. He is convinced that the great majority of judges and lawyers are loyal to their profession and anxious to promote justice and the golden rule. He recognizes, however, that many lawyers (as well as laymen) do good in the world and lead worthy and useful lives without professing any religious creed and without any belief in a personal God. Such men, he holds, are essentially religious at heart, though they deny it and claim that rational ethics and scientific sociology furnish ample proof of the soundness and virtue of the golden rule. Mr. Abbott pleads for tolerance and good will, despite doctrinal differences, and to him law is one of the indispensable instrumentalities of a decent social order. Anarchy and barbarism in international relations—so tragically exemplified by the new war in Europe—are inevitable because the reign of law has not, as yet, been extended to that vast domain. The rulers who are responsible for the war have neither the sentiment nor the idea of law, of justice, of human dignity and human cooperation. Truly, Mr. Abbott has written a tract for the times.

VICTOR S. YARROS

Chicago.

#### A PROSECUTOR'S DUTY

"Under our jurisprudence a criminal prosecution is not a contest between the commonwealth doing all possible to secure a conviction and a defendant endeavoring to secure an acquittal. It is and should be an impartial investigation by the state to determine whether or not the accused is guilty of the offense charged against him. It is the duty of the District Attorney to present not only the facts against the accused but also those favoring him when the same have not been developed by his own counsel. The standard by which a District Attorney's office should be measured is not the proportion of the convictions secured but the fairness with which each case is tried."—Judge J. Orin Waite in *Commonwealth v. Ellis*, Erie County, Pennsylvania, Oct. 24, 1939.

## Leading Articles in Current Legal Periodicals

BY KENNETH C. SEARS

*Professor of Law, University of Chicago*

### ADMINISTRATIVE LAW

**H**AVE We a Government of Laws or a Government of Men, O. R. McGuire, 73 United States L. Rev. 331. (Je. '39; New York City.)

In his address before the Georgia Bar Association last May, Colonel McGuire called attention to the American Bar Association's Administrative Law Bill. He stated that in this bill, court review of administrative action "is intended to be sufficiently broad so that the reviewing court may, though it will not be compelled to, review the facts as well as the law, and in this respect we return to the procedure followed by the courts in earlier times before statutes began to limit their jurisdiction on judicial review of administrative agencies, to the procedure long maintaining in the review of admiralty and equity controversies. . . ." Assuming that this intention is sufficiently expressed in the bill, two comments seem pertinent. (1) The generally prevailing theory of administrative finality of fact findings, based upon substantial evidence, likely will cease to be the orthodox theory of American administrative law. (2) Nothing is said about the procedure in law cases where the trial is before a jury of twelve or one (the trial judge). If the facts determined by this procedure are final, assuming that they are based on substantial evidence, what is wrong with using this procedure, rather than equity procedure, as the model for administrative law?

### CORPORATIONS

*Non-compliance With Proxy Regulations*, by Arthur H. Dean, 24 Cornell L. Quar. 483 (June, '39; Ithaca, N. Y.). This extensive, comprehensive article concerns the effect of non-compliance with proxy regulations on the ability of a corporation to hold a valid meeting of the stockholders, particularly the annual meeting. The problem is important, but abstruse, and at the present time its solution, in the case of most large corporations, involves primarily the extent to which the Securities and Exchange Commission may control action through its rules. At the conclusion of his article, the author advances nine conclusions which, however, are not statements for a lawyer seeking relaxation. The scope of the article is well stated by the author in the following language:

- (a) The nature and character of proxies;
- (b) The nature of the relationship existing between a stockholder and the person designated to act as proxy;
- (c) The duty of the management of corporations to afford stockholders the right to be represented at meetings by proxy;
- (d) Whether proxies obtained on the basis of an allegedly deficient proxy statement can be used in obtaining a quorum or in voting on matters as to which accurate information was given;
- (e) Whether the management must advise stockholders that before mailing the proxy-soliciting material some stockholders had filed notice of intent to propose a motion of a category which may properly be proposed by stockholders at annual meetings, and

whether proxy statements failing to mention such notice of intent are "false and misleading";

(f) The difficulty of the management and of the Securities and Exchange Commission in determining whether a proposed motion is in the category which may properly be offered by a stockholder at an annual meeting;

(g) Whether the management can vote proxies at a meeting on questions which have not been mentioned in the proxy statement and which are proposed by individual stockholders rather than management.

### FREE EXPRESSION

*The Limits of Free Expression*, Grenville Clark, 73 United States L. Rev. 392. (Jl. '39; New York City.)

The question is: "Where and why should the lines be drawn between expression that *ought to be* tolerated and protected and expression that may justifiably be restrained in advance or finished afterwards?" The question is not what may be restrained within the constitution. Rather it is, what is in harmony with the intangible spirit and basic values of English-American liberty. The best answer cannot be secured by mere theory or generalization but by the case method. First, the federal court decisions in the Hague case are preferred to that of the New Jersey State court which held that the right of the community to tranquillity was predominant over the right of public assembly, even though the organizations seeking to assemble were lawful and even though there was no condition of unusual stress. Secondly, the announced policy of the National Association of Broadcasters that the broadcaster, for the sake of national harmony, is justified in refusing to broadcast a speech "plainly calculated or likely to stir up religious prejudice and strife" meets with disapproval. It tends to emasculate the radio as a medium for frank debate of crucial public issues. Thirdly, no disagreement is expressed to the holding of most courts that the legislature has the power to compel public school children to salute and pledge allegiance to the national flag. But if this power is exercised at all it should be kept within very narrow bounds and "I think these salute laws unnecessary and futile to accomplish their professed ends." They represent a wrong tendency.

### JURY SERVICE

*Race Discrimination in Jury Service*, Bernard S. Jefferson, 19 Boston U. L. Rev. 413. (Je. '39; Boston, Mass.)

Not only well known decision of the United States Supreme Court but much less known decisions of various state appellate courts are analyzed. The author is disappointed in both and particularly in the State decisions. Most of the latter are in Southern States, which at best seem to lag behind the doctrines announced by the United States Supreme Court. At worst, some State decisions seem astute to defy the Supreme Court without admitting as much. Professor Borchard is quoted that "it must be remembered that even a Constitution cannot break down the entrenched mores, and that the Court probably has done as much as it can to deal with local prejudice." Professor Jefferson, however, does not "share such beliefs and ideas of resignation and defeatism." He thinks that two Federal statutes have been misinterpreted and that a correct interpretation would permit (1) a removal of a case to a federal court where race discrimination has occurred in the selection of grand or petit jurors be-

cause of the administrative action of jury officials, and (2) the use of habeas corpus to discharge a defendant who is being held in violation of the Fourteenth Amendment because of race discrimination in jury service. Another Federal statute making conduct that disqualifies a citizen as a juror because of race, color, or previous condition of servitude a crime "has remained a dead letter. No real attempt has been made to enforce it."

#### LABOR LAW

*Enforcement of Rights Under Collective Bargaining Agreements*, by Marshall A. Pipin, 6 U. of Chicago L. Rev. 651 (June, '39). Assuming a contract to have been made as the result of union recognition and collective bargaining, the next difficulty concerns disputes arising out of alleged breaches of the contract. Earlier, the contract between the employer and the union was held to give the individual, even though a member of the union, no legal right. But this has been changed by subsequent decisions. Three methods of enforcement have evolved: (1) Contracts have set up adjustment boards, but usually, it appears, the decisions of these boards are not beyond court review or court determination despite the boards; (2) in the realm of judicial relief (significant of changing concepts) it is now generally recognized that seniority is a right which will be protected by equitable remedies; also recent cases suggest that equity in the future will give relief in cases of discharges in violation of the contract; (3) specialized tribunals have appeared in England and Sweden to adjudicate these disputes. In this country we have the National Railroad Adjustment Board. After considering the construction of the board, it is concluded that the board can be established only under the commerce power and "that there must be afforded to all interested parties judicial review *de novo* of jurisdictional questions of fact and a review of questions of law, including the question of whether there is any evidence (not the weight of the evidence) to sustain the board's finding of fact." From this it follows that, as to a non-complaining employee whose rights become involved in a case between others, there is grave doubt of the constitutionality of the present act setting up the National Railway Adjustment Board.

#### LABOR LAW

*Wages and Hours Laws in the Courts*, by Andrew K. Black III, 5 U. of Pittsburgh L. Rev. 223 (May, '39). Shortly after the landing of the Mayflower it seemed expedient in the Plymouth and Massachusetts Bay colonies to pass legislation that restricted the amount of wages that could be paid to certain building laborers. Later there developed the idea that freedom of contract was a right protected by our constitutions. Then came the struggle over the power of regulation under the police power. State maximum hours laws had their difficulties in securing approval, but by the beginning of 1939 all but two States regulated the hours of adult women workers and minors of both sexes. In addition most States limited the hours of certain classes of male workers. But "only four States had successfully applied maximum hours laws to men as well as women in entire occupational groups." Starting later and meeting a more difficult barrier were the minimum wage laws, which in all States except Oklahoma have been confined to women and minors. In addition, since the depression, has come most of the national legislation. The most important of this at the present time is the Fair Labor Standards Act of 1938. This act was drafted to avoid the objection as to delegation of legislative power by estab-

lishing wage and hour standards with almost no resort to administrative action. The difficulty apparently will be to sustain the act under the commerce clause. The act covers not only those engaged in interstate commerce but also those engaged in the production of goods for interstate commerce. Thus it is believed that the act goes beyond the N.L.R.B. Act, although "the employees of most retail establishments" are exempted from the Fair Labor Standards Act. The regulation of wages and hours may fairly relate to the flow of goods in interstate commerce but a "more realistic reason for sustaining the Act would be on the ground that it is a valid exercise of the federal 'police' power over the national market."

#### PUBLIC LAW

*The Legal Status of Federal Government Corporations*, by Harvey Pinney, 27 California L. Rev. 712 (Sept., '39, Berkeley, Cal.). Corporations created by or upon the initiative of the federal government seem to have the courts in a state of confusion in several respects. Consideration of their constitutionality, whether their operations are an exercise of sovereign power or whether they are merely instrumentalities of the government, leads to this conclusion: "Thus it appears that there is no distinct, clear, and complete definition of the status of government corporations. The courts are fairly well agreed that such organizations are separate entities, but that does not go far in solving the problems that arise." Likewise there is confusion whether government corporations exercise private or public functions. As to taxation, the general conclusion is that "the government may tax state proprietary operations, corporate or otherwise, while the state may not tax the corporate instrumentalities of the federal government—either their operations or their property—without the government's consent." It happens to be generally agreed the government corporations are suable unless Congress has otherwise provided.

#### TAXATION

*Multi-State Taxation of Interstate Sales*, George M. Johnson, 27 California L. Rev. 549. (Jl. '39; Berkeley, Calif.)

There has been a shift in taxation doctrine. Prior to 1932 all activities which were integral parts of interstate sales were immune from state taxation. Since then use taxes imposed by the states of Washington and California have been sustained. These taxes were complementary to existing sales taxes and were designed to circumvent the "immunity rule." But the Supreme Court has not yet decided whether such taxes which give no credit to sale or use taxes paid to other states will be sustained. Thus the question is left open "whether unconstitutional multi-state taxation may arise under this type of tax." In addition there are three cases involving gross receipts from interstate transactions. In the first one, the Western Live Stock case, it was implied that "if the receipts are derived from activities performed in more than one state, the tax will be upheld if limited to the gross receipts fairly apportioned to the local activities." This is labelled as the "cumulative burdens" doctrine. Since then the Supreme Court has condemned the Indiana Gross Income Tax Act, as applied to receipts from interstate sales, and a Washington tax on business activity measured by gross receipts, including receipts from interstate commerce. Neither statute provided for apportionment. Thus arises the problem of apportioning gross receipts. As to this there are only a few judicial guide posts and probably the problem will "be solved largely by the method of trial and error."

## COMMITTEE ON LEGAL PUBLICATIONS

THE American Bar Association's Special Committee on Law Reports and Legal Publications is preparing to conduct surveys in Alabama, Colorado, Florida, Indiana, Massachusetts, Michigan, New York, Pennsylvania, Texas, and Washington. . . .

Another survey is being made to ascertain the views of the attorneys in these States on the desirability of providing [a board], composed of experts in various fields of the law, to pass upon the merits of new law text books before they are published. . . .

If a book merited recognition, it would carry the approval of the editorial committee, to assure the members of the legal profession that it was a book of recognized value in its particular field of the law. . . .

In Illinois and Maryland a substantial majority of the attorneys questioned do not believe there is unnecessary duplication of law reports in their respective states, while in Ohio 82.7% of the lawyers who returned questionnaires stated that there is unnecessary duplication in that State. A majority of the attorneys in South Dakota are of the opinion that there is unnecessary duplication in that State. In California 44.5% believe there is unnecessary duplication, and 45.3% answered to the contrary, while 10.2% did not answer this specific question.

A very substantial majority in all five States stated that as a general proposition they would prefer: shorter written opinions; memorandum decisions in cases in which the law is well settled; omission of pure *dicta* by the court.

The majorities in the five States split 3 to 2 against publishing only selected cases.

The majorities in all five States favored having the State bar association designate one set of reports for their respective States, but they were divided on the question of a rule of court restricting citations to the designated reports.

In four States the majorities voted in favor of the official or semi-official reports in the event the reporting of appellate cases should be restricted to one publication. South Dakota, on the other hand, voted 79.8% for the National Reporter System as against 4.9% for the official reports.

It is not possible to include each attorney in the survey, but a representative sampling was polled which included a proportionate representation from cities of different population, from lawyers with varying years of practice and financial rating. . . .

JAMES E. BRENNER,  
Chairman.

## SUMMARY OF AMERICAN BAR ASSOCIATION QUESTIONNAIRE ON DUPLICATION OF LAW REPORTS.

	CALIFORNIA			ILLINOIS			MARYLAND			OHIO			SOUTH DAKOTA		
Number of questionnaires sent.....	263	...	...	332	...	...	145	...	...	271	...	...	188	...	...
Number of replies.....	225	...	...	234	...	...	102	...	...	202	...	...	113	...	...
Percent of replies.....															
	Yes	No	Ans.	Yes	No	No	Yes	No	No	Yes	No	No	Yes	No	No
	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.	Pct.
1. (a) Do you subscribe to official or semi-official reports?															
(1) For your own state?.....	76.9	18.7	4.4	78.6	20.1	1.3	84.3	12.8	2.9	89.6	7.4	3.0	34.5	61.9	3.6
(2) For other states?.....	8.0	78.7	13.3	14.1	73.1	12.8	5.9	84.3	9.8	7.9	73.8	18.3	11.5	82.3	6.2
(b) Do you subscribe to National Reporter System?															
(1) For reporter unit including your own state?.....	35.6	56.9	7.5	47.9	47.9	4.2	25.3	60.5	3.9	28.2	66.8	5.0	92.9	6.2	.9
(2) For other units?.....	22.9	60.9	16.9	28.2	47.9	24.4	18.6	67.6	13.8	11.4	68.8	19.8	47.8	43.4	8.6
4. Do you believe there is unnecessary duplication of law reports in your state?	44.5	45.8	10.2	33.8	56.8	9.4	18.6	74.5	6.9	82.7	13.9	3.4	54.8	41.6	3.6
5. Please indicate whether or not, as a general proposition, you would prefer:															
(a) Shorter written opinions?.....	64.4	28.0	7.6	53.8	37.2	9.0	70.6	26.5	2.9	66.8	28.2	5.0	67.3	27.4	5.3
(b) Memorandum decisions in cases in which the law is well settled?....	68.9	27.1	4.0	61.1	32.5	6.4	72.6	24.5	2.9	75.2	13.4	31.4	88.3	14.1	3.6
(c) Omission of pure dicta by the court?.....	73.8	20.9	5.3	63.4	31.2	6.4	70.6	32.5	6.9	66.8	21.8	11.4	61.4	15.0	8.6
6. A suggested method of reducing the number of volumes of law reports is to publish only selected cases. Please express your opinion on the following points:															
(a) Is such a method desirable generally?.....	26.0	61.3	2.7	31.6	66.2	2.2	30.4	63.8	5.8	49.0	45.5	5.5	51.3	46.0	2.7
(b) Is such a method practicable?..	28.9	60.9	10.2	26.1	63.7	10.2	29.4	62.7	7.9	41.6	46.5	12.9	42.4	54.0	3.6
(c) If such a method is used who should select the cases to be reported?															
(1) The court?.....	32.0	34.0	44.0	51.3	9.4	39.2	55.9	7.9	36.2	29.2	13.9	56.9	42.4	14.1	43.5
(2) The court reporter?.....	4.9	31.1	64.0	1.7	28.5	74.8	9.8	22.5	67.7	8.4	18.3	73.3	2.7	23.0	74.3
(3) A committee of the State Bar Association?.....	35.6	16.9	47.5	25.2	15.4	59.4	15.7	21.6	62.7	39.6	9.9	50.5	39.0	9.7	51.3
(d) Should no decisions be published except those of:															
(1) Your highest court?.....	25.3	38.7	36.0	22.7	40.2	37.1	60.6	13.7	16.7	30.3	47.0	32.7	87.6	8.0	4.4
(2) Highest and other intermediate appellate courts (if any)?.....	76.4	12.0	11.6	85.5	5.1	9.4	8.8	15.7	75.5	68.3	17.8	13.9	54.0	21.2	24.8
(e) Would you favor a rule of court refusing to accept citations to unreported cases?.....	57.8	40.0	1.3	67.5	37.2	4.3	52.9	41.2	5.9	50.5	45.0	4.5	71.7	22.1	6.2
7. Would you favor:															
(a) Having your State Bar Association designate one set of reports for your state?.....	48.4	40.0	11.6	51.7	38.0	10.3	43.1	48.0	6.9	78.7	15.8	5.5	50.4	27.2	12.4
(b) Having your State Bar Association discourage the publication of reports other than those designated?.....	51.1	30.0	12.9	52.1	31.6	16.3	39.9	36.2	24.5	81.2	9.4	9.4	47.8	33.6	18.6
(c) Having a rule of court restricting citations to the designated reports?.....	25.1	53.3	11.6	24.6	58.4	12.0	23.5	53.9	22.6	52.5	34.7	12.5	41.6	41.6	16.8
8. If the reporting of appellate cases in your state were restricted to one publication, which publication would you prefer?															
(a) Separate official or semi-official state reports?.....	51.8	...	...	52.7	...	...	52.4	...	...	61.5	...	...	4.9	...	...
(b) Natl. Reporter Unit which includes cases from your state and those from adjoining states?..	28.5	...	...	27.9	...	3.3	22.3	...	11.7	12.7	...	12.6	79.8	...	6.0
(c) Break down the Natl. Reporter Unit and publish the cases from your state in separate volumes?..	19.7	...	...	15.1	...	...	12.6	...	...	12.2	...	...	9.3	...	...

## REVIEW OF RECENT SUPREME COURT DECISIONS

Court Annuls City Ordinances Prohibiting Distribution of Handbills on Public Streets—77B Plan Must be "Fair and Equitable"; Stockholders' Rights Subordinate to Those of Creditors—Railroad Trustee Under Sec. 77 Must Obey State Regulatory Orders on Service—Pipe-line Companies are Statutory "Common Carriers" Although They Do not Transport for Hire—State May Require License Before Liquor May be Transported in Interstate Commerce—Possibility of Double Inheritance Taxation Not Enough to Give Original Jurisdiction to Supreme Court in Action Between States—Home Owners Loan Mortgages Not Subject to Local Recording Fees—Corporation Naming Agent for Service of State Process Held to Consent to Federal Jurisdiction in That State—No Taxable Gift Inter Vivos when Donor in a Trust Reserves Right of Revocation and Dies Without Having Exercised Power—Federal Interpleader—Other Interesting Decisions

BY EDGAR BRONSON TOLMAN\*

### Municipal Ordinances; Distribution of Handbills; Freedom of Speech and of the Press

Municipal authorities may enact regulations in the interests of public health, welfare, or convenience but ordinances thus enacted may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinions.

*Schneider v. The State (Town of Irvington)*; *Young v. The People of the State of California*; *Snyder v. City of Milwaukee*; *Thompson v. Commonwealth of Massachusetts*, Nos. 11, 13, 18, 29.

In Los Angeles, Milwaukee, and Worcester there were city ordinances regulating the distribution of handbills and the like. In Irvington, New Jersey, there was an ordinance regulating canvassing, peddling, and soliciting money from door to door.

In the first three cities the ordinances were enforced against those who distributed handbills for various causes.

In Los Angeles the handbills bore a notice of a meeting to be held under the auspices of "Friends Lincoln Brigade," at which speakers would discuss the war in Spain.

In Milwaukee the handbills were distributed by a picket in front of a meat market involved in a labor dispute.

In Worcester leaflets were distributed announcing a protest meeting in connection with the administration of state unemployment insurance.

In Irvington a member of the Watch Tower Bible and Tract Society called from house to house in the town at all hours of the day and night leaving booklets discussing problems affecting the persons interviewed and soliciting small contributions to promote the further distribution of leaflets and booklets.

In each of these cases arrests were made under the various ordinances and convictions were had in the lower courts and in each instance affirmed by the highest courts of the respective states.

The state courts distinguished the various ordinances from that involved in *Lovell v. City of Griffin* on the ground that the ordinance there in question pro-

hibited distribution anywhere in the city while the one here involved forbid distribution in a very limited number of places. Each ordinance was sought to be sustained as a measure of health, public order, and cleanliness necessary to prevent the littering of streets. The four cases were consolidated in the Supreme Court of the United States. The opinion of the court was delivered by MR. JUSTICE ROBERTS. He said in regard to the handbill ordinances:

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

\*Assisted by JAMES L. HOMTRE and LELAND L. TOLMAN.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

The Court reviewed its recent decision in *Lovell v. City of Griffin*, and claimed that the facts there were to be distinguished from those in the cases at bar.

In regard to the Los Angeles, Milwaukee, and Worcester ordinances, the court said:

"The motive of the legislation under attack in Numbers 13, 18 and 29 is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

"It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

"It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

As to the Irvington ordinance, the Court said:

"While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those, who, like the petitioner desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the project he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."

The Court further states,

"Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

"We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

"The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

"Mr. JUSTICE McREYNOLDS is of opinion that the judgment in each case should be affirmed."

No. 11 was argued on Oct. 13, 1939, by Mr. Joseph F. Rutherford for petitioner and by Mr. Robert I. Morris for respondent; No. 13 was argued on Oct. 13, 1939, by Mr. Osmond K. Fraenkel for appellant; No. 18 was argued on Oct. 13, 1939, by Mr. A. W. Richter for petitioner and by Mr. Carl F. Zeidler for respondent; No. 29 was argued on Oct. 16, 1939, by Mr. Sidney S. Grant and Mr. Osmond K. Fraenkel for appellants and Mr. Edward O. Proctor for appellee.

#### **Bankruptcy Act—Section 77B—Plan Must Be Fair and Equitable: Stockholders' Rights Subordinate to Creditors'**

Under §77B of the Bankruptcy Act, a plan of reorganization to be approved by the Court must have not only the assent of the requisite percentages of security holders, but must also be found to be fair and equitable.

Where a corporation is found to be insolvent in both the equity and bankruptcy sense, a plan of reorganization cannot be approved as fair and equitable which allows the stockholders to retain an interest in the reorganized company where the claims of creditors have not been fully satisfied, unless the stockholders make a contribution in money or money's worth equivalent to the extent of the participation accorded them.

*Case v. Los Angeles Lumber Products Co., Ltd.*, 84 Adv. Op. 22; 60 Sup. Ct. Rep. 1.

This opinion deals with the question of conditions under which stockholders may participate in a plan of reorganization under §77B of the Bankruptcy Act, where the debtor corporation is insolvent both in the equity and in the bankruptcy sense.

The debtor is a holding company which owns all the stock (save qualifying shares) of six subsidiaries, of which but one has assets of any substantial value. This one, the Los Angeles Shipbuilding and Drydock Corporation, has fixed assets of \$430,000 and current assets of \$400,000; it also has current debts of small amount.

The debtor's liabilities consist of principal and in-

terest of \$3,807,071.88 on first mortgage bonds issued in 1924 and maturing in 1944. These are secured by a trust indenture covering the fixed assets of the Ship-building Company and the stock of all the subsidiaries. No interest on the bonds has been paid since 1929. In 1930 a voluntary reorganization was effected with the assent of 97% face amount of the bondholders, whereby the interest was reduced from a rate of  $7\frac{1}{2}\%$  to 6% and made payable only if earned. The old stock was wiped out and two classes of new stock, Class A and Class B, were issued.

In 1937 the management prepared a plan of reorganization, to be carried out either by contract or by resort to §77B. The directors chose the latter method. The plan, as later modified, provided for a new corporation with 1,000,000 shares of \$1 par value voting stock, to be divided into 811,375 of preferred and 188,625 of common. The preferred is entitled to a 5% non-cumulative dividend. Following that both classes share equally. Also on liquidation the preferred receives a preference to the amount of the par value, following which the common is entitled to the amount of its par value. Thereafter both classes participate equally.

Of the new preferred, 170,000 shares are reserved for sale to raise new money for rehabilitation, and 641,375 are to go to the bondholders, 250 shares for each \$1,000 bond. Class A stockholders will receive 188,625 shares of common without payment of any subscription or assessment. No provision is made for the old Class B stock. The aggregate par value of the new preferred and common to be issued to existing security holders is \$830,000,—an amount equal to the going concern value of the assets of the enterprise.

The plan was assented to by approximately 92.81% of the face amount of the bonds, 99.75% of Class A stock, and 90% Class B stock. Petitioners, owners of \$18,500 face amount of bonds, did not consent to the 1930 reorganization, and throughout the 77B proceedings they objected to the plan as not fair and equitable to the bondholders.

The District Court approved the plan, and the Circuit Court of Appeals affirmed. On certiorari, the Supreme Court reversed the judgment, in an opinion by Mr. JUSTICE DOUGLAS.

The opinion of the Court points out that the effect of the plan is to give the old stockholders 23% of the assets and voting power in the new company, without making any fresh contribution, notwithstanding that the claims of the bondholders are not fully satisfied. The District Court justified this inclusion of the stockholders (1) because it felt that the relative priorities of bondholders and stockholders were maintained by virtue of the preferences in the stock accorded the bondholders, and the fact that they received 77% of the voting power in the new company; and (2) because it found that the stockholders had furnished compensating advantages or consideration. The Circuit Court of Appeals affirmed, in view of a stipulation and the abbreviated record filed thereunder.

After stating the case, Mr. JUSTICE DOUGLAS first discusses the effect of the provision of §77B requiring that a plan thereunder, to be approved, must not only be assented to by the prescribed percentages of the security holders, but also that it must be found by the judge to be "fair and equitable." Emphasis is placed on the point that the former is not a substitute for the latter. In this connection, the opinion observes:

"The court is not merely a ministerial register of the vote of the several classes of security holders. All those

interested in the estate are entitled to the court's protection. Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. This is in line with the decision of this Court in *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, which reversed an order approving a plan of reorganization under §77B, in spite of the fact that the requisite percentage of the various classes of security holders had approved it, on the grounds that preferred stock of the debtor corporation was inequitably treated under the plan. The contrary conclusion is such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by the Congress on the district courts under §77B. That function and duty are no less here than they are in equity receivership reorganizations, where this Court said, 'Every important determination by the court in receivership proceedings calls for an informed, independent judgment.'

"Hence, in this case the fact that 92.81% in amount of the bonds, 99.75% of the Class A stock, and 90% of the Class B stock have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only \$18,500 face amount of a large bond issue."

Attention is then turned to the meaning of the terms "fair and equitable" as used in the statute. It is noted that these words are words of art which had acquired a fixed meaning in equity receivership cases. Citing prior decisions discussing the meaning of the phrase, Mr. JUSTICE DOUGLAS gives the following exposition of the rule:

"In equity reorganization law the term 'fair and equitable' included, *inter alia*, the rules of law enunciated by this Court in the familiar cases of *Railroad Co. v. Howard*, 7 Wall. 392; *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674; *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482; *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U. S. 445. These cases dealt with the precedence to be accorded creditors over stockholders in reorganization plans. In *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, *supra*, this Court reaffirmed the 'familiar rule' that 'the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors.' And it went on to say that 'any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation' (p. 684). This doctrine is the 'fixed principle' according to which *Northern Pacific Railway Co. v. Boyd*, *supra*, decided that the character of reorganization plans was to be evaluated. And in the latter case this court added, 'If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event, it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.' (p. 508) On the reaffirmation of this 'fixed principle' of reorganization law in *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, *supra*, it was said that 'to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation' (p. 455). In application of this rule of full or absolute priority this Court recognized certain practical considerations and made it clear that such rule did not 'require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock.' *Northern Pacific Railway Co. v. Boyd*, *supra*, p. 508. And this practical aspect of the problem was further amplified in *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, *supra*, by the statement that 'when necessary, they (creditors) may be protected through other

arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right' (pp. 454-455). And it also recognized the necessity at times of permitting the inclusion of stockholders on payment of contributions, even though the debtor company was insolvent. As stated in *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, *supra*, p. 455: 'Generally, additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them unless stockholders are permitted to contribute and retain an interest sufficiently valuable to move them. In such or similar cases the Chancellor may exercise an informed discretion concerning the practical adjustment of the several rights.' But even so, payment of cash by the stockholders for new stock did not itself save the plan from the rigors of the 'fixed principle' of the *Boyd* case, for in that case the decree was struck down where provision was not made for the unsecured creditor and even though the stockholders paid cash for their new stock. Sales pursuant to such plans were void, even though there was no fraud in the decree. *Northern Pacific Railway Co. v. Boyd*, *supra*, p. 504. As this Court there stated, p. 502, 'There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree.'

The Court then considers the plan in question in the light of the meaning attributed to the statutory requirement and states its reasons for concluding that the plan falls short. It is pointed out that even if all the assets were turned over to the bondholders they would realize less than 25% on their claims, but that in spite of this the plan requires them to surrender 23% of the whole enterprise to the old stockholders. While it is recognized that the relative priorities of bondholders and old Class A stockholders are maintained, it is pointed out that this is not in compliance with the established principles applicable, since it permits the old stockholders of an insolvent company to participate in the reorganized company without a contribution in money or money's worth reasonably equivalent to the stockholders' participation.

An analysis then follows of the consideration furnished by the stockholders in the present case. This included (a) benefits supposed to fall to the bondholders because the old stockholders have "financial standing and influence in the community" and can provide "continuity of management"; (b) the awarding to the bondholders of more than they would receive on a foreclosure; (c) the virtual abrogation of the agreement deferring foreclosure until 1944; and (d) the avoidance of litigation with the stockholders. All were found to be insufficient.

In discussing the third of these items of consideration, the Court observes that on the record the conclusion cannot be reached that the right of foreclosure survived the commencement of §77B proceedings, since by instituting such proceedings the debtor placed its property under the jurisdiction of the Court to be adjudicated according to standards prescribed by the statute. In elaboration of this, Mr. JUSTICE DOUGLAS says:

"A debtor as well as a creditor who invokes the aid of the federal courts in reorganization or rehabilitation under §77B assumes all of the consequences which flow from that jurisdiction. Once the property is in the hands of the court private rights as respect that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by the Congress. As a result of such proceedings the hand of all executions or levies may be stayed. The court acquires

'exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section.' The court need not keep the debtor in possession but may substitute for the old management a trustee; or if the old management is retained it operates the business 'subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as the judge may from time to time impose and prescribe.' Thus, while the property remains in the hands of the court, as it does until dismissal or final decree on confirmation, the debtor, though left in possession by the judge, does not operate it, as it did before the filing of the petition, unfettered and without restraint. The control of the court is then pervasive. Furthermore, stockholders and other junior interests may be excluded from any plan of reorganization if the court finds that the debtor is insolvent. . . . And on facts such as exist here, these junior interests must be excluded unless they furnish adequate consideration for the interest which they obtain in the new company. And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits. One of those disadvantages from the viewpoint of the debtor and its stockholders is the approval of a plan of reorganization which eliminates them completely. Accordingly, respondent's assertion in this case that the major contribution of these stockholders justifying their inclusion in the plan was the waiver of their right to defer or put off foreclosure until 1944, i.e., to remain in possession, does not stand analysis. The right to remain in unmolested dominion and control over the property was necessarily waived or abandoned on invoking the jurisdiction of the federal courts in these proceedings. When that jurisdiction attached, the court rather than the stockholders was in control with all of the powers and duties which that entailed under §77B. Certainly the surrender of a right thus waived is not adequate consideration for the dilution of the bondholders' priorities which this plan would effect."

The opinion also disposes of an argument to the effect that the right of participation by the stockholders was secured by contract before, and as a condition precedent to, the institution of the 77B proceedings. In rejecting this contention, the Court places special emphasis upon the fact that the Act imposes upon the federal courts peculiar duties for the protection of unorganized security holders. Touching this, the opinion adds:

"But the mere statement of this proposition is its own refutation. If the reorganization court were bound by such conventions of the parties, it would be effectively ousted of important duties which the Act places on it. Federal courts acting under §77B would be required to place their imprimatur on plans of reorganization which disposed of the assets of a company not in accord with the standards of 'fair and equitable' but in compliance with agreements which the required percentages of security holders had previously made. Such procedure would deprive scattered and unorganized security holders of the protection which the Congress had provided them under §77B. The scope of the duties and powers of the Court would be delimited by the bargain which reorganizers had been able to make with security holders before they asked the intercession of the court in effectuating their plan. Minorities would have their fate decided not by the court in application of the law of the land as prescribed in §77B, but by the forces utilized by reorganizers in prescribing the conditions precedent on which the benefits of the statute could be obtained. No conditions precedent to enjoyment of the benefits of §77B can be provided except by the Congress. To hold otherwise would be to allow reorganizers to rewrite it so as to best serve their own ends."

In conclusion the Court rejects the contention that there was adequate consideration to the bondholders in having the stockholders maintain the debtor as a going

concern in avoiding litigation with the old stockholders.

Mr. JUSTICE BUTLER took no part in the consideration of this case.

Argued by Mr. Robert M. Clarke for the petitioners and by Mr. Solicitor General Jackson for the U. S. as *amicus curiae*, by special leave of court, and by Mr. J. Clifford Argue and Mr. John C. Macfarland for respondent.

#### Bankruptcy Act—Section 77—Jurisdiction of District Court Over Local Service

Under §77 of the Bankruptcy Act, the District Courts have not been vested with power to order the discontinuance of local railroad services which, but for the bankruptcy proceedings, would otherwise be subject to the regulatory power of the state.

*Palmer v. Massachusetts*, 84 Adv. Op. 8; 60 Sup. Ct. Rep. 34.

In this opinion the Court ruled on a question as to the power of a District Court to order the discontinuance of local railroad service under §77 of the Bankruptcy Act. The New York, New Haven and Hartford Railroad Company filed a petition for reorganization under that section in October, 1935, and the proceeding is still pending. The railroad's bankruptcy trustees instituted proceedings before the Massachusetts Department of Public Utilities for leave to abandon 88 passenger stations. While the proceedings were there under consideration, creditors of the New Haven applied to the District Court for an order directing the trustees to abandon these local services. The trustees joined in the prayer, while the Commonwealth denied the jurisdiction of the court to make the order. The District Judge ruled that §77 gave him the responsibility of disposing of the petition on its merits. Accordingly, after hearing, he entered an order directing the discontinuance of the services.

On appeal, the Circuit Court of Appeals reversed the decree with one judge dissenting. On certiorari, the Supreme Court affirmed the opinion of the Circuit Court of Appeals, in an opinion by Mr. JUSTICE FRANKFURTER.

The opinion first observes that it is clear that the District Court had no power to deal with a subject under the authority of the Commonwealth unless Congress has conferred such power. It is also noted that the statute contains no explicit grant of the power assumed by the District Judge. The language of the Act from which the petitioners thought the power in question is to be inferred appears in §77(a) and §77(c) (2). These subsections give the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located" and permit the trustees, under the court's control, "to operate the business of the debtor." The Court expressed the view that these provisions do not include power over the railroad company's relations with the state.

It was reasoned further that not only is there no specific grant of such power, but that the historic background of §77, the circumstances concerning its enactment, and the legislative scheme disclosed by its specific provisions preclude such an interpretation. In exposition of this view, Mr. JUSTICE FRANKFURTER says:

"Not only is there no specific grant of the power which the District Court exercised, but the historic background of §77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amend-

ment of March 3, 1933, railroads were outside the Bankruptcy Act. But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of §77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

"The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commission's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission. Thus, in §77(c) and §77(o) the power of the district courts to permit abandonments is specifically conditioned on authorization of such abandonments by the Commission. In view of the judicial history of railroad receiverships and the extent to which §77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road. About a fourth of the railroad mileage of the country is now in bankruptcy. The petitioners ask us to say that district judges in twenty-nine states have effective power, in view of the weight which often attaches to findings *in nisi prius*, to set aside the regulatory systems of these twenty-nine states with all the consequences implied for those communities. Congress gave no such power."

Mr. JUSTICE BUTLER took no part in the consideration of this case.

Argued by Mr. Edward R. Brumley for petitioners and by Mr. Edward O. Proctor for respondent.

#### Interstate Commerce Act—Application to Pipe-Line Companies

Under the Interstate Commerce Act, the term "common carrier" includes all pipe-line companies, irrespective of whether they are engaged in transportation for hire. As a common carrier, a pipe-line company is subject to the relevant provisions of the Act, and is required to submit to the Interstate Commerce Commission such data pertaining to its property as the Commission by proper order may direct.

*Valvoline Oil Co. v. United States*, 84 Adv. Op. 112; 60 Sup. Ct. Rep. —.

This case involved a question as to the scope of the Interstate Commerce Act in its relation to pipe-line properties. The Interstate Commerce Commission made an order requiring the appellant to file with the Commission certain data as to its pipe-line properties for use in valuation under sec. 19a of the Interstate Commerce Act. The order was made upon the theory that the appellant was "engaged in the transportation of oil by pipe line in interstate commerce and that it is a common carrier subject to the provisions of the Interstate Commerce Act." The appellant challenged the validity of the order in a three-judge federal court. That

court dismissed the petition, which sought to enjoin and annul the Commission's order. On appeal, the decree was affirmed by the Supreme Court in an opinion by Mr. JUSTICE REED.

The activities of the company are described in the opinion. It appears that the appellant operates 1,426 miles of pipe-line running to 9,020 wells in Pennsylvania, West Virginia and Ohio from which it gathers 75,000 barrels of oil per month for its two refineries in Pennsylvania, which manufacture the products distributed by the appellant to the trade. At the time of the Commission's final order, the appellant was selling surplus oil to a refinery in Pennsylvania and to another in West Virginia, but none of this came from out of the state of the refinery. On the ground that it does not engage in transporting oil interstate, other than that which it purchases at the well for its own use, the appellant claimed that it is not a common carrier subject to the Act and, in the alternative, that if it is, the statute is unconstitutional as a violation of the due process clause.

The pivotal question in the case was the construction of Section 1 (3) which provides that:

"The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."

In construing the statute to include as common carriers all pipe-line companies, irrespective of whether engaged in transportation for hire, the Court says:

"There is no controversy over whether appellant is an interstate pipe line company. Obviously it is. The contentions above are advanced to show it is not subject to the Act. Section 1(3) defines common carrier to include 'all pipe-line companies.' If this definition is not limited by the subsequent clause 'engaged . . . as common carriers for hire,' extended consideration of these characteristics of a private carrier is unnecessary as the language of the definition is decisive.

"The practice of compelling producers to sell at the well before admitting their oil to the lines was widely used as a means of monopolizing the product before the Hepburn Amendment in 1906. Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. Certainly one would find a public interest in the sole means of transporting this commodity from thousands of wells for thousands of producers. This was covered by the *Pipe Line* decision. There it was stated that commerce is not dependent on title, 'and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce.' The applicable section of the Interstate Commerce Act at the time of the *Pipe Line Cases* read:

That the provisions of this Act shall apply to any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act.

This Court construed that section to cover those who were common carriers in substance even if not in technical form and read it that those 'engaged in the transportation of oil . . . by means of pipe lines' shall be treated as common carriers under the Act. The last clause was held not 'to cut down the generality' of the Act.

"In the present Act there is a change of language but we perceive none in meaning. Speaking of the amendments of the Transportation Act of 1920, which recast the Hepburn Amendment into the present form, the House Committee on Interstate and Foreign Commerce reported that the section here under consideration 'amends the first

five paragraphs of section 1 of the Commerce Act, making minor corrections and classifying language in several respects, but making no important changes in policy.' As now written the section brings railroads under the Act by means of the last clause of subsection (3) only. This clause is a conjunctive, not a modifier. It does not affect the generality of the first clause as to pipe-line companies."

In conclusion the validity of the provision requiring pipe-line companies to furnish prescribed data was also considered. The constitutional question involved in this phase of the case was deemed settled by the *Pipe Line Cases*, 234 U.S. 548.

Mr. JUSTICE BUTLER took no part in the decision of this case.

Argued by Mr. J. Campbell Brandon for appellant and Mr. Hugh B. Cox for appellees.

#### State Statutes—Kentucky Alcoholic Beverage Control Law—Constitutional Validity

The provisions of the Kentucky Alcoholic Beverage Control Law which prohibit the transportation of liquors except by one licensed therefor under the Act are a valid exercise of the State's police power and are not in violation of the commerce clause of the Constitution or of the due process and equal protection clauses of the Fourteenth Amendment. A contract carrier having a certificate under the Federal Motor Carrier Act of 1935, engaged in transporting liquors in interstate commerce, is subject to the regulatory power of the State, as exercised in the Control Law.

*Ziffrin v. Martin*, 84 Adv. Op. 107; 60 Sup. Ct. Rep. 117.

This case involves a challenge to the validity of certain provisions of the Kentucky Alcoholic Beverage Control Law. The appellant, an Indiana corporation, is a contract carrier having permission under the Federal Motor Carrier Act of 1935 to operate as a contract carrier. Since March, 1923, it has continuously received whiskey from distillers in Kentucky for consignees in Chicago. It claims the right to transport whiskey as heretofore, notwithstanding the provisions of the Control Law of 1938. In this proceeding it sought to restrain Kentucky officials from enforcing the contraband and penal provisions of the Control Law. It charged that enforcement of the Control Law would impair its rights under the commerce clause of the Constitution and deprive it of rights under the due process and equal protection clauses of the fourteenth amendment. A district court of three judges sustained a motion to dismiss. On direct appeal, the decree was affirmed by the Supreme Court in an opinion by Mr. JUSTICE McREYNOLDS.

The opinion summarizes the purpose of the Act as follows.

"The Statute is a long, comprehensive measure (123 sections) designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to constant control by the state. Every phase of the traffic is declared illegal unless definitely allowed. The property becomes contraband upon failure to observe the statutory requirement and whenever found in unauthorized possession."

Section 27 of the law authorizes the holder of a transporter's license "to transport liquors to or from the licensed premises of any licensee under the Act. . ." Section 54(7) permits the issuance of a transporter's

license only to persons who are authorized by proper certificate from the division of motor transportation in the department of business regulation to engage in the business of a common carrier. The appellant was denied a common carrier certificate and because it held no such certificate its application for a transporter's license was also refused.

The appellant argued that the Control Law is unconstitutional because, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Further, that intoxicating liquors are legitimate articles in interstate commerce unless otherwise declared by federal law; that interstate commerce includes exportation of property as well as importation, and that prior to the Wilson and Webb-Kenyon Acts and the twenty-first amendment the powers of the states over intoxicants in both movements were limited by the commerce clause. Since these enactments, relative to importations only, exports remain, as always, subject to the commerce clause and consequently the state may not annex to its consent to manufacture and sell an unconstitutional ban upon interstate exports of liquors by contract carriers. This argument was rejected by the Court.

MR. JUSTICE McREYNOLDS states the reasons which led the Court to conclude that the challenged requirements of the state statute are constitutional. In this connection, he says:

"The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. . . .

"Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. . . . The state may protect her people against evil incident to intoxicants, . . . ; and may exercise large discretion as to means employed.

"Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue. The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. . . .

"In effect we are asked by injunction to allow a distiller to do what the statute prohibits—deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing—receive and transport within the state. . . .

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity."

The contentions based on the due process and equal protection clauses were rejected. So also was

the argument based on discrimination against interstate commerce, since the same regulations are applicable to intrastate commerce. Moreover, the Court found nothing in the Federal Motor Carrier Act of 1935 which undertakes to impair the power of the states to protect their people against the evils of intoxicants.

Argued by Mr. Norton L. Goldsmith for appellants and by Mr. H. Appleton Federa for appellees.

#### Courts—Supreme Court—Original Jurisdiction

A necessary element to constitute a controversy between states within the original jurisdiction of the Supreme Court is a showing that the complainant state has suffered wrong through the action of another state, furnishing ground for judicial redress or asserting a right susceptible of judicial enforcement in accordance with established principles of law or equity.

A claim by two states of the right to tax the transfer of intangible property at death is not a controversy within the original jurisdiction of the Supreme Court, where the tax claims are not shown to be mutually exclusive, and where there is no showing that the estate is not sufficient to meet both claims.

Original jurisdiction cannot be supported over the case as involving a claim by the complainant state against citizens of another state, where the complainant has an adequate remedy in the courts of the state wherein individual defendants reside.

*Massachusetts v. Missouri*, 84 Adv. Op. 38; 60 Sup. Ct. Rep. 39.

This opinion dealt with a motion by Massachusetts for leave to file a bill of complaint against the State of Missouri and certain of the latter's citizens. The opinion of the Court, delivered by Mr. CHIEF JUSTICE HUGHES, is devoted to the question whether the bill of complaint presents a justiciable controversy within the original jurisdiction of the Supreme Court. The argument in support of the jurisdiction rests upon two grounds: (1) that there is a controversy between two states; and (2) that there is a controversy between a state and the citizens of another state. Upon examination of the bill of complaint, the Court concluded that jurisdiction to hear the matter failed.

The proposed complaint alleged that Madge Barney Blake, domiciled in Massachusetts, died in 1935, leaving an estate there of \$12,646.02 which has been administered and that this estate will be exhausted by costs of administration and federal taxes; that the decedent, while so domiciled, created three trusts of securities valued at the time of death at \$1,850,789.77, and made residents of Missouri trustees under the trusts; that in two trusts, involving the major part of the securities, the settlor retained power of revocation; that both Massachusetts and Missouri have inheritance tax statutes imposing taxes on property passing at the death of the donor; that Massachusetts taxes intangibles only when owned by an inhabitant of that state; that Missouri exempts intangibles from tax when owned by non-residents who reside in states extending reciprocal provisions to Missouri residents; that here both states claim the exclusive right to lay taxes upon the estate; that Missouri intends to exert jurisdiction over the trusts and property to the exclusion of Massachusetts; that Massachusetts has taken its statutory action to determine the amount of the tax and by whom it is payable; and that there is due to Massachusetts from the respondent trustees \$137,000, if all the trust estates are taxable, and \$127,000, if only the property under the two revocable trusts is taxable; and finally,

that the tax cannot be collected from any persons or property in Massachusetts.

The bill alleges the absence of any adequate remedy other than in the Supreme Court sitting in equity and prays that the Court determine whether Massachusetts or Missouri is entitled to impose the tax in question.

Dealing first with the contention that the bill presents a controversy between the states Mr. CHIEF JUSTICE HUGHES states that a necessary element of such controversy is a showing that the complaining state has suffered wrong through the action of the other state, furnishing ground for judicial redress or asserting a right susceptible of judicial enforcement in accordance with the established principles of common law or equity. As indicative of failure to make such a showing, it is observed that the bill fails to assert that there is any danger of depletion of the fund or estate which will be detrimental to the complainant's interest, as there are sufficient funds to meet the claims of both states; and further, that the bill does not show that the tax claims of the two states are mutually exclusive.

In this connection, *Texas v. Florida*, 306 U.S. 398, is distinguished, because there the controlling feature was that, by the law of the several states interested, only a single tax by one state could be laid, namely, the state of domicile. Moreover, it there appeared that there was danger that through the successful prosecution of claims of the several states, independently, the estate would be consumed and some state would be deprived of its lawful tax.

Massachusetts urged further that controversy has arisen over the enforcement of the reciprocal provisions of the taxing acts of the two states and that Massachusetts and its citizens are entitled to the immunity afforded by the Missouri statute under the reciprocal legislation. Rejecting this argument on the ground that the reciprocal legislation conferred no contractual right on Massachusetts, Mr. CHIEF JUSTICE HUGHES states:

"Massachusetts urges that a controversy has arisen over the enforcement of the reciprocal provisions of the tax statutes of the two States. It is said that Missouri has enacted reciprocal legislation under which there is exempted from taxation the transfer of intangibles where the transferor at the time of death was a resident of a State which at that time did not impose a transfer or death tax in respect of the intangible property of residents of other States or if the laws of the State of residence contained a reciprocal exemption provision (Missouri Rev. Stat. 1929, c. 1, art. 21, sec. 576); and that Massachusetts since 1927 (St. 1927, c. 156) has granted complete exemption from the inheritance tax to intangible property not belonging to its inhabitants. Mass. General Laws (Ter. Ed.) c. 65, sec. 1. The argument is that Massachusetts and its residents are entitled to the immunity offered by the Missouri statute.

"But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. I, sec. 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legislation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essential character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice.

"The suggestion that residents of Massachusetts are

entitled to the immunity offered by the Missouri statute is unavailing, as Massachusetts may not invoke our jurisdiction for the benefit of such individuals."

Attention is next directed to the attempt to support the jurisdiction on the grounds that the bill of complaint presents a controversy between Massachusetts and citizens of Missouri. The first objection noted to this argument was that the bill was not framed on that theory but was drawn upon the theory that a controversy exists between the two states. But the Court states further that even if the pertinent allegations respecting the other theory be disregarded, it still fails to meet the jurisdictional requirement, since as a simple action to recover from the trustees the amount of the tax there is no necessity for resort to a court of equity for equitable relief.

Furthermore, the Court emphasizes the importance of restricting the exercise of jurisdiction to cases where it is necessary for the state's protection. In the instant case the Court concludes that it does not appear that Massachusetts is without a proper and adequate remedy, since that State may bring an action against the trustees in Missouri. In explanation of this point, Mr. CHIEF JUSTICE HUGHES says:

"In this instance it does not appear that Massachusetts is without a proper and adequate remedy. Clause 2 of Section 2 of Article III merely distributes the jurisdiction conferred by clause one. . . . The original jurisdiction of this Court, in cases where a State is a party, 'refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a federal Court, *Cohens v. Virginia* [6 Wheat. 264, 398, 399]. With respect to the character of the claim now urged, we are not advised that Missouri would close its courts to a civil action brought by Massachusetts to recover the tax alleged to be due from the trustees. The Attorney General of Missouri at this bar asserts the contrary. He says that 'it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a federal district court in Missouri' and that 'such a suit would be of a civil nature and would present a justiciable case or controversy.' We have said that the objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes, is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes 'not to the jurisdiction but to the merits,' and raises a question which district courts are competent to decide."

Argued by Mr. Edward O. Proctor for complainant and by Mr. Harry W. Kroeger for St. Louis Union Trust Co. et al. and by Mr. Edward H. Miller for State of Missouri.

#### Federal Statutes—§ 51 Judicial Code;\* Venue in Diversity of Citizenship Cases; Waiver of Privilege and Consent to Be Sued

Designation by a foreign corporation of an agent for service of process in conformity with a state statute is a waiver of the personal privilege respecting the venue or place of suit and operates as consent to be sued in the Federal courts in that state even though the corporation is a resident and citizen of another state.

*Neirbo Company v. Bethlehem Shipbuilding Corp. Ltd.*

The district court for the Southern District of New York set aside service of process upon Bethlehem Ship-

\*For text of § 51, see page 1059, col. 2, end.

building Corporation Ltd., and dismissed the bill as to it. The suit was based on diversity of citizenship and was not brought "in the district of the residence of either the plaintiff or the defendant."

Certiorari was allowed because of conflict between the views of the circuit courts of appeals for the second and tenth circuits. The sole question in the case was stated to be "whether § 51 is satisfied by the designation by a foreign corporation of an agent for service of process in conformity with a law of a state in which suit is brought against it in one of the federal courts for that state."

MR. JUSTICE FRANKFURTER delivered the opinion of the court. He said:

"The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. . . . Section 51 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' . . .

"Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. . . . Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind § 51, which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found.'"

MR. JUSTICE FRANKFURTER reviewed at length the prior decisions in which various phases of the general question were involved and had been discussed, and compared the simplicity of these questions when natural persons were involved with the complexities of the questions when corporate litigants are involved.

He commented on the amendment of section 51 of the Judiciary Act and said:

"The Act of 1887 omitted the words 'in which he shall be found.' But, of course, the Phoenix and the Clinton Insurance Company in *Ex parte Schollenberger*, *supra*, were not geographically 'found' in Pennsylvania, and Chief Justice Waite so recognized. They were 'found' in the Eastern District of Pennsylvania only in a metaphorical sense, because they had consented to be sued there by complying with the Pennsylvania law for designating an agent to accept service. Not less than three times does the opinion point out that the corporation gave 'consent' to be sued; and because of this consent the Chief Justice added that the corporation was 'found' there. But the crux of the decision is its reliance upon two earlier cases, *Railroad Company v. Harris*, 12 Wall. 65, and *Lafayette Ins. Co. v. French*, 18 How. 404, recognizing that 'consent' may give 'venue'. . . . Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in that state. As to diversity cases, Congress has given the federal courts 'cognizance, concurrent with the courts of the several States.' The consent, therefore, extends to any court sitting in the state which applies the laws of the state."

Speaking of the purpose of the amendment, the Justice said:

"The deletion of 'in which he shall be found' was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, ex-

cept with the defendant's consent, to the district of his physical habitation."

In support of this thesis it was declared that after the amendment of 1887 and despite the elimination of the words "in which he shall be found," lower federal courts continued to consider the designation of an agent for service of process as an effective consent to be sued in the federal court (citing many cases).

In conclusion it was said:

"In conformity with what is now § 210 of the General Corporation Law of New York, Bethlehem designated 'William J. Brown as the person upon whom a summons may be served within the State of New York.' The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: 'The stipulation is therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person "upon whom process against the corporation may be served." . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.' . . . A statute calling for such a designation is constitutional, and the designation of the agent 'a voluntary act.' . . .

"In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that 'state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case.' . . . The judgment below is reversed."

MR. JUSTICE ROBERTS read a dissenting opinion in which the CHIEF JUSTICE and MR. JUSTICE McREYNOLDS concurred. He expressed approval of the "careful and discriminating opinion" of the circuit court of appeals for the second circuit; reviewed early cases dealing with the question; analyzed the decision in *Ex parte Schollenberger* on which the prevailing opinion relied, and distinguished its effect. He cited and quoted from other cases, and in concluding his dissenting opinion said:

"Upon principle, and under the authorities, the mere fact that service of process valid under state law can be had on an officer or agent of a foreign corporation doing business within the state is irrelevant; for although the corporation may be served in conformity to local law, it cannot be compelled to try its case in a federal court sitting in the state. I do not understand the opinion of the court to hold to the contrary."

"But it is said that registration and designation of an agent upon whom service may be made under compulsion of state law amounts to a waiver of the requirements of Sec. 51 as to venue, or to a consent to be sued in a federal court sitting within the state."

"As has been shown by quotation from the opinion, this contention was made in *Southern Pacific Co. v. Denton*, *supra*, and was overruled. The holding was one of the alternative grounds of decision. The *Southern Pacific* case settled the application of Sec. 51, in the circumstances here disclosed, and the decision has never been qualified or overruled. The lower federal courts have understood and applied that decision with practical uniformity to enable the foreign corporation to contest the venue of suits against it."

"I see no reason at this late day to attribute a new effect to the statute when Congress has not seen fit to express a view contrary to that embodied in this court's construction of the law; though this might at any time be done. The principle of *stare decisis* seems to me to make against such a change."

"The court below has analyzed the applicable New

York statute and has satisfactorily demonstrated that it deals with service of process on foreign corporations in the courts of New York. The state could not, by its laws, affect the jurisdiction of federal courts or the venue of suits therein—a matter solely within the control of Congress."

The case was argued on Oct. 17 and 18, 1939, by Robert P. Weil and Laurence Arnold Tanzer for petitioners and by William D. Whitney for respondent.

#### Taxation—Federal Tax on Gifts Inter Vivos

The federal tax on a gift *inter vivos* is not operative until the donor has parted with his interest in the subject of the gift and the gift is complete. Consequently, a transfer of intangible property *inter vivos* upon trust is not complete where the donor reserves the power to revoke the trust or change the beneficiary and the transfer is not subject to the gift tax where the donor retains such power until his death. But, if the donor renounces all power to revoke the trust or change the beneficiary, the gift thereupon becomes complete and is subject to the gift tax at that time.

*Sanford v. Commissioner of Internal Revenue*, 84 Adv. Op. 53; 60 Sup. Ct. Rep. 51 (No. 34, decided November 6, 1939); *Rasquin v. Humphreys*, 84 Adv. Op. 61; 60 Sup. Ct. Rep. 60; (No. 37, decided November 6, 1939).

In these two cases the Court considered a question as to when a transfer of property in trust, *inter vivos*, becomes complete in relation to the gift tax imposed by federal revenue laws.

In the *Sanford Case*, No. 34, the donor, in 1913, before the enactment of the first gift tax of 1924, created a trust of personalty for named beneficiaries, reserving the power to terminate the trust in whole or in part, or to modify it. In 1919 he surrendered the power to revoke the trusts, but reserved the power to modify them in any manner short of withdrawal of principal or income. In August, 1924, after the gift tax took effect, the donor renounced his remaining power over the trusts. He died in 1928. Later the Commissioner, following the decision in *Hesslein v. Hoey*, 91 F. (2d) 954 in 1937, ruled that the gift became complete and taxable only on the decedent's final renunciation of power to modify the trusts, and notice of a tax deficiency issued. The Board of Tax Appeals and the Circuit Court of Appeals sustained the tax. The Supreme Court granted certiorari on the government's representation that it (the government) has taken inconsistent positions in the *Sanford* and *Humphreys Cases*, Nos. 34 and 37, on the question, and that a ruling by the Court is desirable to remove confusion in the administration of the revenue laws.

The Supreme Court affirmed the judgment in an opinion by Mr. JUSTICE STONE. At the outset he points out that the statutes taxing gifts are to be considered in the light of the closely related provisions of the revenue laws taxing transfers at death. The latter have been construed in such manner as to recognize that the passage of control over the economic benefits of property is of greater importance than technical changes in its title. And the opinion cites prior decisions which have held subject to the estate taxes the relinquishment of certain powers over property in trust, where the relinquishment became operative by reason of the death of the person vested with the power.

Application of this same underlying principle led to the conclusion that the gift tax is not operative until the gift becomes complete. In elaboration of this view, Mr. JUSTICE STONE states:

"There is nothing in the language of the statute, and

our attention has not been directed to anything in its legislative history, to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnett v. Guggenheim*, 288 U. S. 280. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.

"Section 322 of the 1924 Act provides that when a tax has been imposed by §319 upon a gift, the value of which is required by any provision of the statute taxing the estate to be included in the gross estate, the gift tax is to be credited on the estate tax. The two taxes are thus not always mutually exclusive as in the case of gifts made in contemplation of death which are complete and taxable when made, and are also required to be included in the gross estate for purposes of the death tax. But §322 is without application unless there is a gift *inter vivos* which is taxable independently of any requirement that it shall be included in the gross estate. Property transferred in trust subject to a power of control over its disposition reserved to the donor is likewise required by §302(d) to be included in the gross estate. But it does not follow that the transfer in trust is also taxable as a gift. The point was decided in the *Guggenheim* case where it was held that a gift upon trust, with power in the donor to revoke it, is not taxable as a gift because the transfer is incomplete, and that the transfer whether *inter vivos* or at death becomes complete and taxable only when the power of control is relinquished. We think, as was pointed out in the *Guggenheim* case, *supra*, 285, that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete."

The Court suggests other reasons for rejection of the taxpayer's contention, notably the provisions of the 1932 Act which make the donee liable for any tax to the extent that the donor fails to pay it. It is argued that it can hardly be supposed that Congress intended to impose a personal liability on the donee, where the gift is so incomplete that he may be deprived of it by the donor the day after he has paid the tax. Allusion is made also to the exemption provisions applicable to gifts to charities, as bearing on the legislative intent.

The opinion discusses the petitioner's contentions that the legislative history of the statute and administrative practice under it call for a construction different from that adopted by the Court. These contentions are rejected by the Court.

In the *Humphreys Case*, No. 37, the question arose under the Revenue Act of 1932. In that case the respondent created a trust in 1934 for his own benefit for life, with remainders over. He reserved power to change the beneficiaries and to prescribe the conditions under which new beneficiaries should take an interest in the trust, but reserved no power to increase his own beneficial interest in the trust. A gift tax was assessed against him, on the remainder interests, which he paid. In an action to recover the tax the settlor obtained a judgment, which the Supreme Court sustains in a brief opinion by Mr. JUSTICE STONE. The opinion points out that the pertinent provisions of the Act do not differ in any respect presently material from those construed in the *Sanford Case*, and that the reasons there

stated control here, since the power reserved to the donor made the gift incomplete and not subject to the gift tax.

Mr. JUSTICE BUTLER took no part in the decision of these cases.

The cases were argued for petitioners by Messrs. Montgomery B. Angell and John W. Davis in No. 34, and Mr. Frank Murphy, Attorney General, and Miss Helen R. Carloss, Special Assistant Attorney General in No. 37, and for the respondents by Mr. Frank Murphy, Attorney General, and Miss Helen R. Carloss, Special Assistant Attorney General in No. 34, and by Miss Sidney W. Davidson in No. 37.

## Summaries

### State Taxation—Immunity of Federal Instrumentalities—Home Owners Loan Corporation

*Pittman v. H. O. L. C.* 84 Adv. Op. 16, 60 Sup. Ct. Rep. 15. [No. 10, decided November 6, 1939.]

Certiorari was granted to review an order of the Maryland courts granting a writ of mandamus to require the clerk of the Baltimore City Court to record a mortgage executed by the Home Owners Loan Corporation upon payment of the ordinary recording charge and without affixing stamps for the state recording tax.

The Court's opinion by Mr. CHIEF JUSTICE HUGHES holds that the state recording tax was in fact imposed upon the mortgage and paid by the lender even though its collection under the taxing statute was a condition attached to the registration of the mortgage and the statute does not specify who is to pay it; that the mortgage and its recordation are indispensable elements of the corporation's lending operation authorized by Congress, and, therefore, are included in the terms of that provision of the Home Owners Loan Act which provides that the corporation and its "loans" are exempt from all state and municipal taxes.

The opinion then concludes that the Congress had power under Art. I, § 8, par. 18 of the Constitution to provide for the tax immunity of the corporation as an exercise of its power to protect the lawful activities of its agencies, and the provision thus lawfully enacted is binding upon the Supreme Court under Article VI of the Constitution.

Mr. JUSTICE BUTLER did not participate.

The case was argued on October 12th and 13th, 1939, by Mr. Vernon Eney and Mr. William C. Walsh for the petitioner and by Mr. Solicitor General Jackson for the respondent.

### Bankruptcy—Immunity of Estate from State Penalties for Non-Payment of State License Fees

*Boteler v. Ingels.* 84 Adv. Op. 20, 60 Sup. Ct. Rep. 29. [Nos. 15 and 16, decided Nov. 6, 1939.]

Certiorari to determine whether a bankrupt's estate is liable to penalties imposed by state statutes for non-payment of automobile license fees where license fees and penalties claims accrued during operation for purposes of liquidation of the business of the bankrupt's estate by the trustee in bankruptcy.

The Court's opinion by Mr. JUSTICE BLACK holds that § 57 J of the Bankruptcy Act which provides that with certain exceptions debts owing to a state, county, or municipality as a penalty are not to be allowed, does not prohibit the state from enforcing the penalties in this case since that section prohibits only penalties incurred by the bankrupt before bankruptcy by reason of his own delinquency and does not purport to exempt the trustee from the operation of state laws or relieve

the estate from liability for the trustee's delinquencies. The opinion further holds that the Act of June 18, 1934, which declares that a trustee operating a business shall be subject to all state and local taxes applicable to the business as if the business were conducted by an individual corporation indicates a congressional intention that state tax laws should apply in such cases as this. The opinion, therefore, answers the question in the affirmative.

Mr. JUSTICE BUTLER did not participate.

The case was argued on October 16, 1939, by Mr. Raphael Dechter for petitioner and by Mr. H. H. Linney for respondents.

### Patents—Validity of Process Claims for Manufacture of Yeast

*Standard Brands, Inc. v. National Grain Yeast Corp.* 84 Adv. Op. 14, 60 Sup. Ct. Rep. 27. [No. 9, decided Nov. 6, 1939.]

Certiorari was granted in this case to settle conflicting lower court holdings as to the validity of Hayduck patents No. 1,449,103, 1,449,105, 1,449,106, relating to processes for manufacturing baker's yeast.

The Court's opinion by Mr. JUSTICE McREYNOLDS holds that the first claim is invalid for want of invention over prior art; that in the second the disclosure is too vague and indefinite to constitute invention, and that the third, being based upon a mere union of the processes of the first two, can not be sustained since it requires nothing beyond the skill of the art.

Mr. JUSTICE BUTLER and Mr. JUSTICE STONE did not participate.

The case was argued on October 12, 1939, by Mr. Leonard A. Watson for petitioner and by Mr. Stephen H. Philbin for respondent.

### Social Security Taxes—Contracts—Nature of Tax Under Government Contract Defined

*U. S. v. Glenn L. Martin Co.,* 84 Adv. Op. 51, 60 Sup. Ct. Rep. 32. [No. 30, decided Nov. 6, 1939.]

Certiorari to determine whether a Federal government contract to purchase certain aircraft and aircraft material required the United States to increase the stipulated price by the amount of Social Security taxes paid by the seller. The contract provided that the prices stipulated include any Federal tax imposed before the date of the contract and which apply to the material called for. But, to offset effects upon the seller's margin of profit which might result from possible future increases in Federal taxes "applicable to the material," the Government agreed to compensate the seller for payment of future Federal taxes "on the articles or supplies contracted for" if Congress should levy any sales tax, processing tax, or other tax "applicable directly upon production, manufacture, or sale of the articles contracted for."

The Court's opinion by Mr. JUSTICE BLACK holds that the Social Security taxes are taxes on payrolls, or on the relationship of employment, and are not taxes "on" the articles processed or sold. It construes the contract to refer to taxes "on" the goods to be provided under it. Therefore, it concludes that the Social Security taxes are not contemplated by the contract and the liability of the United States is, therefore, not increased by them.

Mr. JUSTICE BUTLER did not participate.

The case was argued on October 19th and 20th, 1939, by Mr. Assistant Attorney General Clark for petitioner and by Mr. John T. Koehler for respondent.

**Federal Income Tax—Depletion Allowances—"Net Income from the Property" Defined—Validity of Administrative Rulings**

*Helvering v. Wilshire Oil Company, Inc.* 84 Adv. Op. 43, 60 Sup. Ct. Rep. 18. [No. 1, decided November 6, 1939.]

Certiorari was granted in this case to determine whether in computing its net income for the years 1929 and 1930 for the purpose of applying in accordance with § 114 (b) (3) of the Revenue Act of 1928, the limitation of 50 per cent of "the net income of the taxpayer" on the depletion allowance permitted to oil and gas companies by § 23 of the Revenue Act of 1928, the taxpayer may refuse to take as deductions certain development expenditures required to be taken by Treasury regulation 74, Art. 221 (i) promulgated under the authority of § 23 (1) of the Act, where it has deducted those development expenditures in computing its taxable net income for those years.

The Court's opinion by MR. JUSTICE DOUGLAS holds that the taxpayer falls clearly within the class described in Treasury regulation 74, Art. 221 (i) and that, as applied to the taxable years in question, the regulation does not have such a retroactive effect on the instant case as to make it inapplicable. It also rejects the argument that a different administrative ruling applied by the commissioner under earlier acts was in effect adopted by Congress when the statutory language which the regulation defines was re-enacted in the 1928 act, so that it could not later be changed prospectively as it is by the regulation here applied. It therefore concludes that the regulation is a valid exercise of the administrative rule-making power under § 23 of the Act and must be observed by the taxpayer in this case.

MR. JUSTICE BUTLER and MR. JUSTICE REED did not participate.

The case was argued on October 9, 1939, by Mr. Arnold Raum for petitioner and by Mr. Joseph D. Brady for respondent.

*F. H. E. Oil Company v. Helvering.* 84 Adv. Op. 50, 60 Sup. Ct. Rep. 26. [No. 26, decided November 6, 1939.]

Certiorari was granted here to decide the same question involved in *Helvering v. Wilshire Oil Company, Inc.*, ante, as it arose under the Revenue Act of 1932 and Treasury regulations issued by its authority.

The Court's opinion by MR. JUSTICE DOUGLAS holds that since comparable regulations under the 1928 Act were lawful, those involved here are valid and binding on the taxpayer.

MR. JUSTICE BUTLER and MR. JUSTICE REED did not participate.

The case was argued on October 9th and 10th, 1939, by Mr. Harry C. Weeks for petitioner and by Mr. Arnold Raum for respondent.

**Federal District Court Jurisdiction—Interpleader Act—Res Adjudicata—Full Faith and Credit**

*Treinies v. Sunshine Mining Company et al.* 84 Adv. Op. 1, 60 Sup. Ct. Rep. 44. [No. 4, decided November 6, 1939.]

Certiorari was granted in this case to review a decree of the Idaho District Court on a bill of interpleader brought by a Washington corporation against citizens of Washington who claimed some of its corporate stock, and citizens of Idaho, adverse claimants of the same

stock. The Washington claimants based their claim on an adjudication of the state courts of Washington in 1935 awarding ownership to them. The Idaho claimants asserted their ownership upon an adjudication in 1936 of the state courts of Idaho awarding ownership to them. After the Idaho decree in 1936, the Washington claimants commenced a second proceeding in the Washington state courts to quiet title to the stock on the ground that the Idaho decree was invalid for want of jurisdiction.

The federal interpleader was then filed by the corporation and the Federal court enjoined further proceedings in the Washington state court.

The Court's opinion by MR. JUSTICE REED first examines the jurisdiction of the Federal courts under the Federal Interpleader Act of 1936 and concludes that even though the constitutional limitation on Federal judicial power be construed to require that suits in the Federal courts be limited to controversies wholly between citizens of different states, and although, in this case, the corporation and one of the claimants are citizens of the same state, yet the constitutional requirement here is satisfied as the real controversy is between the two interpleaded claimants who are citizens of different states, and the complainant is merely a disinterested stakeholder.

The opinion then holds that the Eleventh Amendment, forbidding suits by a citizen against a state, is not, because the receiver and judge in the Washington State Court were joined as defendants, a barrier to the action, since neither the receiver nor the judge was enjoined by the final decree. It also concludes that the prohibition of § 265 of the Judicial Code against stays in United States courts of proceedings in state courts is not applicable since the Interpleader Act properly authorizes injunctions against suits in any court in proceedings under that act.

The opinion then rejects the argument of the Washington claimant that, in holding that the Idaho state proceeding, which had involved a ruling that the Washington courts were without jurisdiction of the dispute, was res judicata in the Federal proceeding and could not be relitigated there, the district court had violated the full faith and credit clause of the Constitution by failing to give effect to the decision of the Washington state courts that the courts of that state did have jurisdiction of the dispute. The opinion bases this branch of its holding upon the conclusion that the Idaho courts had determined that the Washington court did not have jurisdiction over the subject matter, and this holding of the Idaho court is unassailable collaterally since the Idaho court had full power to determine the question.

MR. JUSTICE BUTLER did not participate.

The case was argued on October 10, 1939, by Mr. Thomas D. Aitken for petitioner, by Mr. C. W. Halverson for Sunshine Mining Company, and by Mr. Richard S. Munter for Katherine Mason et al.

(See page 1055, col. 2, end)

Section 51. Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

# DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

## FROM BULLETINS XLVIII, XLIX, L AND LI ISSUED BY THE DEPARTMENT OF JUSTICE

### RULE 2—One Form of Action

*American LaFrance Fire Engine Company, Inc., to the use of American LaFrance and Foamite Industries, Inc. v. Borough of Shenandoah.* (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Oct. 11, 1939).

In an equity action commenced prior to the effective date of the Rules, but decided subsequently, the fact that the plaintiff may have had an adequate remedy at law becomes immaterial and does not constitute a ground for dismissing the action. (Rule 86)

### RULE 4—Process—Subdivision (d)—Summons: Personal Service

*William Thomas Gresham v. Swift & Company.* (Western District of Louisiana, Shreveport Division, DAWKINS, D. J., Sept. 13, 1939).

1. If, after removal from a state to a Federal court, the state court process served upon defendant proves to be defective, now process may be issued out of the Federal court and delivered to the marshal for service in the same manner as in actions originally commenced in the Federal court.

2. In an action against a foreign corporation, plaintiff may require defendant to supply information as to whereabouts of an agent upon whom service of process may be made.

### RULE 6—Time—Subdivision (b)—Enlargement

*Rebecca Gruskin v. New York Life Insurance Company.* (Western District of Pennsylvania, GIBSON, D. J., Oct. 11, 1939).

While the time within which to serve a demand for trial by jury should not, under ordinary circumstances, be enlarged when failure to make the demand was due solely to inadvertence of counsel, nevertheless in a case removed from a state court when the Rules had not been in effect a long time and lawyers were not fully familiar with their requirements, a motion for a jury trial presented approximately two months after time to demand a jury has expired was granted as a matter of discretion. (Rule 39 (b))

### RULE 7—Pleadings Allowed; Form of Motions—Subdivision (a)—Pleadings

*Abe Bender et al. v. Michael A. Conner, Com'r of Motor Vehicles.* (District of Connecticut, CLARK, C. J., Aug. 11, 1939).

1. A reply to an answer which does not contain a counterclaim and a rejoinder are improper and should be treated as superfluous.

2. Even if the complaint contains no allegation of jurisdiction and the issue is not raised by defendant, the court of its own accord should nevertheless consider it. (Rule 8 (a))

*United States Trust Company of New York et al.*

*v. Mary Pouch Sears.* (District of Connecticut, CLARK, C. J., Oct. 16, 1939).

Admissions contained in a reply may be considered on a motion for judgment on the pleadings, even though the service of a reply was not authorized.

### RULE 8—General Rules of Pleading—Subdivision (a)—Claims for Relief

*Abe Bender et al. v. Michael A. Connor, Com'r of Motor Vehicles.* (District of Connecticut, CLARK, C. J., Aug. 11, 1939).

Even if the complaint contains no allegation of jurisdiction and the issue is not raised by defendant, the court of its own accord should nevertheless consider it.

*Ida W. Atwater v. The North American Coal Corporation et al.* (Southern District of New York, CLANCY, D. J., Sept. 30, 1939).

A claim for relief stated in such a manner that it cannot be determined whether it is for fraud, for breach of contract, or for conversion, should be dismissed with leave to amend.

[EDITORIAL NOTE: But see Rule 8(a), clause (2). See also statement by Dean (now Judge) Clark in the first paragraph on p. 234, Proceedings of Cleveland Institute.]

*Elliott, Trustee v. Mosgrove.* (Supreme Court of the State of Oregon, ROSSMAN, J., Sept. 19, 1939).

Action in a state court against the estate of a deceased trustee by his successor to recover the trust res. At the trial, after both sides had rested, plaintiff was allowed to amend his complaint to conform to the evidence by asking for an accounting. Held, the amendment did not introduce a new cause and, hence, was permissible. In the course of the opinion, meaning of "cause of action" discussed. (Rule 15 (b))

*Ida W. Atwater v. The North American Coal Corporation et al.* (Southern District of New York, CLANCY, D. J., Sept. 30, 1939.) A claim for relief stated in such a manner that it cannot be determined whether it is for fraud, for breach of contract, or for conversion, should be dismissed with leave to amend.

### Subdivision (b)—Defenses; Form of Denials

*Caterpillar Tractor Company v. International Harvester Company.* (Circuit Court of Appeals for the Ninth Circuit, STEPHENS, C. J., Oct. 4, 1939).

A denial on the ground that the party is without any knowledge is a sufficient denial.

### Subdivision (c)—Affirmative Defenses

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills Company.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

1. In an action for damages for price discrimination under the Robinson-Patman Act, the defense of

justification is in the nature of a plea in avoidance and should be pleaded affirmatively.

2. A party should not be ordered to serve a bill of particulars which would require him to produce the facts which the opposing party must show to make out a prima facie case. (Rule 12 (e))\*

3. Redundant matter may be allowed to remain in a pleading if it is not seriously prejudicial. (Rule 12 (f))

\*[EDITORIAL NOTE: Presumably such information may be obtained by interrogatories or depositions.]

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills Company* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

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#### **RULE 10—Form of Pleadings—Subdivision (c)—Adoption by Reference; Exhibits**

*The American Surety Company of New York v. The Federal Reserve Bank of Kansas City.* (Western District of Missouri, Western Division, REEVES, D. J., Oct. 12, 1939).

1. An exhibit annexed to a complaint is a part thereof for all purposes and must be considered in determining the sufficiency of the pleading.

2. In an action on a written instrument, if the averments of the complaint are completely negated by the instrument which is annexed as an exhibit, the latter prevails.

#### **RULE 12—Defenses and Objections—Subdivision (c)—Motion for Judgment on the Pleadings**

*Caterpillar Tractor Company v. International Harvester Company.* (Circuit Court of Appeals for the Ninth Circuit, STEPHENS, C. J., Oct. 4, 1939).

1. In an action for declaratory judgment to establish non-infringement by plaintiff of defendant's patent, judgment on the pleadings should not be granted if there is a genuine issue as to the existence of an actual controversy as a basis for declaratory relief. (Rule 57)

2. A denial on the ground that the party is without any knowledge is a sufficient denial. (Rule 8 (b))

*United States Trust Company of New York et al. v. Mary Pouch Sears.* (District of Connecticut, CLARK, C. J., Oct. 16, 1939).

1. Admissions contained in a reply may be considered on a motion for judgment on the pleadings, even though the service of a reply was not authorized. (Rule 7 (a))

2. Formal findings of fact are not required if all statements of fact made on behalf of either party are admitted in the pleadings. (Rule 52 (a))

#### **Subdivision (e)—Motion for More Definite Statement or for Bill of Particulars**

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills*

*Company.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

A party should not be ordered to serve a bill of particulars which would require him to produce the facts which the opposing party must show to make out a prima facie case.

*Joseph Van Dyke v. Thomas H. Broadhurst.* (Middle District of Pennsylvania, WATSON, D. J., Oct. 6, 1939).

1. If a counterclaim is so vague that a reply cannot properly be prepared in response thereto, plaintiff is entitled to a more definite statement of defendant's claim.

2. A motion for a more definite statement of the claim which fails to point out the defects complained of and the details desired is defective and may be dismissed but the court may supply the deficiencies and grant the motion.

*The Cheney Company v. D. Coyle Cunningham et al.* (Western District of Pennsylvania, SCHOONMAKER, D. J., Oct. 17, 1939).

Bills of particulars should be confined to ultimate facts and not extend to evidentiary matters.

A party should not be required to serve a bill of particulars regarding matters within his adversary's knowledge such as what assertions, if any, the latter had made to certain other persons.

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills Company.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

A party should not be ordered to serve a bill of particulars which would require him to produce the facts which the opposing party must show to make out a prima facie case.

#### **Subdivision (f)—Motion to Strike**

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills Company.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

Redundant matter may be allowed to remain in a pleading if it is not seriously prejudicial.

*Frederick W. Huber, Inc. v. Pillsbury Flour Mills Company.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

Redundant matter may be allowed to remain in a pleading if it is not seriously prejudicial.

#### **RULE 13—Counterclaim and Cross-Claim—Subdivision (a)—Compulsory Counterclaims**

*The Cheney Company v. D. Coyle Cunningham et al.* (Western District of Pennsylvania, SCHOONMAKER, D. J., Oct. 17, 1939).

1. In an action for patent infringement in which defendant interposes a counterclaim for declaratory relief as to another of plaintiff's patents, such counterclaim may be dismissed if plaintiff amends his complaint by including a charge of infringement of the patent referred to in the counterclaim.

2. Bills of particulars should be confined to ultimate facts and not extend to evidentiary matters. (Rule 12 (e))

3. A party should not be required to serve a bill of particulars regarding matters within his adversary's knowledge such as what assertions, if any, the latter had made to certain other persons. (Rule 12 (e))

#### **Subdivision (b)—Permissive Counterclaims**

*Stewart-Warner Corporation v. Universal Lubricating Systems, Inc.* (Western District of Pennsylvania, SCHOONMAKER, D. J., Oct. 17, 1939).

1. In an action for patent infringement com-

menced before the Rules became effective, a counterclaim for damages under the antitrust laws, which is triable of right by a jury, held proper, even though filed before such date, on a motion to dismiss filed before but coming on to be heard after such date. (Rule 86)

2. A counterclaim for damages for violation of the antitrust laws may be interposed in an action for patent infringement.

3. By commencing an action, the plaintiff submits himself to the jurisdiction of the court as to any counterclaim.

4. A counterclaim was filed prior to effective date of new Rules, but a motion to dismiss it came on to be heard subsequently to such date. By that time, a separate action on the claim would have been barred. *Held*, the propriety of the counterclaim should be determined under the new Rules. (Rule 86)

#### **RULE 14—Third-Party Practice—Subdivision (a)—When Defendant May Bring in Third Party**

*Jennie Watkins v. The Baltimore & Ohio Railroad Company v. Rochester & Pittsburgh Coal Company.* (Western District of Pennsylvania, SCHOONMAKER, D. J., Oct. 19, 1939).

Person employed on coal conveyor erected adjacent to a railroad was killed by passing train. His estate sued the railroad. *Held*, the railroad was entitled to bring in the corporation that had erected the conveyor, as such corporation had given the railroad an indemnity agreement against claims for damages caused by such accidents.

*Fannie Fink v. The Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin v. Virginia C. Wolf et al.* (Eastern District of Michigan, Southern Division, PICARD, D. J., Oct. 12, 1939).

In an action to recover the benefits under a life insurance policy by the administratrix of the estate of the beneficiary, other contingent beneficiaries to whom the benefits had already been paid may be brought in as third-party defendants.

*LeRoy Burris v. American Chicle Company.* (Eastern District of New York, GALSTON, D. J., Oct. 20, 1939).

1. In an action for personal injuries sustained by plaintiff while cleaning windows on defendant's premises, the defendant may bring in a window cleaning concern with which it had a contract for the performance of the services, it appearing that the defendant claimed the injuries were caused by the neglect of such concern.

2. Plaintiff may not object to third-party proceeding on the ground that he has no right of action against the proposed third-party defendant.

*Joseph Calvino v. Pan-Atlantic Steamship Corporation et al. v. Ryan Stevedoring Company, Inc.* (Southern District of New York, GODDARD, D. J., Oct. 20, 1939).

A stevedore sued the owner of a vessel for injuries sustained by him as a result of a defective hatch cover. The defendant sought to bring in as a third-party defendant a stevedoring company by which plaintiff was employed, alleging that it was in control of the hatch and demanded that the third-party should be held liable to plaintiff, if any one is. *Held*, plaintiff's employer was not liable to plaintiff for damages since the Longshoremen's and Harbor Workers' Compensation Act limits such liability to compensation fixed by the Act. The owner of the vessel may bring in plaintiff's employer, however, as a third-party defendant, if he can support a claim against the employer by way of recoupment or indemnity.

*Gertrude Mead Morrell v. United Air Lines Transport Corporation v. United Aircraft Corporation et al., Pauline I. Lickel v. United Air Lines Transport Corporation v. United Aircraft Corporation et al.* (Southern District of New York, GODDARD, D. J., Oct. 26, 1939).

1. The jurisdictional and venue requirements of an independent action need not be met in a third-party proceeding, since such proceeding is ancillary to the original action. (Rule 82)

2. Permitting a defendant to bring in a third-party defendant without an independent basis of jurisdiction and without showing independent venue requirements does not constitute an extension of the jurisdiction or venue of the court in contravention of Rule 82. (Rule 82)

3. Liability of the third-party defendant to the defendant is sufficient to support third-party proceedings without showing direct liability to the plaintiff. Consequently, plaintiff's failure to allege liability of the third-party does not bar defendant from maintaining third-party proceeding.

4. In an action for damages for death occurring in an airplane accident, the defendant transport company was permitted to maintain third-party complaints against the manufacturer of the airplane and the manufacturer of one of the parts, on the theory that defective parts caused the accident.

#### **RULE 15—Amended and Supplemental Pleadings—Subdivision (b)—Amendments to Conform to the Evidence**

*Elliott, Trustee v. Mosgrove.* (Supreme Court of the State of Oregon, ROSSMAN, J., Sept. 19, 1939).

Action in a state court against the estate of a deceased trustee by his successor to recover the trust res. At the trial, after both sides had rested, plaintiff was allowed to amend his complaint to conform to the evidence by asking for an accounting. *Held*, the amendment did not introduce a new cause and, hence, was permissible. In the course of the opinion, meaning of "cause of action" discussed.

#### **Subdivision (c)—Relation Back of Amendments**

*James F. White v. Holland Furnace Co., Inc.,* (Southern District of Ohio, Eastern Division, UNDERWOOD, D. J., Oct. 27, 1939).

An amendment based on the same facts as those set forth in the original complaint, the only change being one of theory from an action in contract to one in tort for conversion, relates back to the date of the original pleading, and consequently is not affected by the running of the statute of limitations between the date of the filing of the complaint and the date of the amendment.

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#### **RULE 16—Pre-Trial Procedure; Formulating Issues**

*Elizabeth Godfrey Haywood et al. v. J. C. Maschke et al.* (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Oct. 13, 1939).

A pre-trial conference resulted in a stipulation disposing of all of the issues raised by the pleadings, leaving for subsequent determination only the question as to whether interest runs on the obligation involved and, if so, from what date.

**RULE 17—Parties Plaintiff and Defendant; Capacity—Subdivision (b)—Capacity to Sue or Be Sued**

*W. Bruce Pirnie v. Archie M. Andrews et al.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

1. The capacity of a foreign executor to sue or be sued in his representative capacity is determined by the law of the state in which the Federal court is held.

2. An action removed from a state court, in which the state court never had jurisdiction over the removing defendant, should be remanded.

*W. Bruce Pirnie v. Archie M. Andrews, et al.* (Southern District of New York, GODDARD, D. J., Oct. 5, 1939).

1. The capacity of a foreign executor to sue or be sued in his representative capacity is determined by the law of the state in which the Federal court is held.

2. An action removed from a state court, in which the state court never had jurisdiction over the removing defendant, should be remanded.

**RULE 18—Joinder of Claims and Remedies—Subdivision (b)—Joinder of Remedies; Fraudulent Conveyances**

*W. E. Richardson, Trustee, etc., et al. v. Blue Grass Mining Company et al.* (Eastern District of Kentucky, FORD, D. J., Oct. 17, 1939).

A claim to adjudicate plaintiff's status as a stockholder may be joined in the same action with a claim to enforce a secondary right on behalf of the corporation.

**RULE 20—Permissive Joinder of Parties—Subdivision (a)—Permissive Joinder**

*Wyoga Gas & Oil Corporation v. Geddes H. Schrack et al.* (Middle District of Pennsylvania, JOHNSON, D. J., Oct. 7, 1939).

Joinder of non-residents who cannot be served with process as parties defendant does not deprive the court of jurisdiction, if such non-residents are not indispensable parties.

**RULE 21—Misjoinder and Non-Joinder of Parties**

*Nina Wilcox Putnam Eliot et al. v. Geare-Marston, Inc.* (Eastern District of Pennsylvania, KALODNER, D. J., Oct. 5, 1939).

The author of a literary production should not be joined as a party plaintiff with the copyright proprietor in an action to enjoin infringement of copyright, since the author is not entitled to any part of the recovery. However, such misjoinder is not ground for dismissal of the complaint.

**RULE 23—Class Actions—Subdivision (b)—Secondary Action by Shareholders**

*W. E. Richardson, Trustee, etc., et al. v. Blue Grass Mining Company et al.* (Eastern District of Kentucky, FORD, D. J., Oct. 17, 1939).

1. A claim to adjudicate plaintiff's status as a stockholder may be joined in the same action with a claim to enforce a secondary right on behalf of the corporation. (Rule 18 (b))

2. In a stockholder's derivative suit, diversity of

citizenship between the plaintiff and the corporate defendant is not necessary to support Federal jurisdiction.

3. The owner of an equitable interest in corporate stock is entitled to maintain a stockholder's derivative suit.

**RULE 25—Substitution of Parties—Subdivision (a)—Death**

*Augusta Winkleman et al. v. General Motors Corporation et al.* (Southern District of New York, MANDELBAUM, D. J., Oct. 23, 1939).

Plaintiff's failure to revive the action against the legal representative of a deceased defendant within the two-year period fixed by Rule 25 (a) must result in dismissal as against such deceased defendant even though the action is a stockholder's derivative action.

*Augusta Winkleman et al. v. General Motors Corporation et al.* (Southern District of New York, MANDELBAUM, D. J., Oct. 23, 1939).

Plaintiff's failure to revive the action against the legal representative of a deceased defendant within the two-year period fixed by Rule 25 (a) must result in dismissal as against such deceased defendant even though the action is a stockholder's derivative action.

**Subdivision (d)—Public Officers; Death or Separation from Office**

*State of Oklahoma, ex rel. Bill Vassar, County Attorney, Lincoln County v. Missouri-Kansas-Texas Railroad Company et al., and seven other cases.* (Western District of Oklahoma, VAUGHT, D. J., Oct. 11, 1939).

An action to escheat land brought by a county attorney on behalf of the state abates if plaintiff ceases to be such county attorney and his successor in office fails to revive the action within six months thereafter, and should be dismissed.

**RULE 26—Depositions Pending Action—Subdivision (a)—When Depositions May Be Taken**

*Samuel Burak v. Charles Scott et al.* (District of Columbia, MORRIS, J., Oct. 18, 1939).

A judgment creditor may not require persons other than the judgment debtor to disclose their assets.

**Subdivision (b)—Scope of Examination**

*John J. McCarthy v. Howard S. Palmer et al.* (Eastern District of New York, MOSCOWITZ, D. J., Oct. 16, 1939).

A party should not be permitted to examine affidavits and similar materials secured by another party by independent investigation incident to the preparation of the latter's case for trial, except in the most unusual circumstances.

*Walter D. Fletcher v. Foremost Dairies, Inc. of New York.* (Eastern District of New York, GALSTON, D. J., Oct. 20, 1939).

1. In an action for personal injuries sustained in an automobile accident, plaintiff was denied right to take depositions of the executive officers of defendant corporation on the ground that they would not be competent witnesses since they were not present at the accident or knew anything about it.

2. Plaintiff in an action for personal injuries sustained in an automobile accident was denied production of employment record of the driver of defendant's vehicle and also maintenance and repair records of the vehicle for a period of six months prior to the accident, such records for one month prior to the accident being regarded as sufficient, it appearing that the maintenance,

operation and control of the vehicle were admitted by defendant.

**RULE 30—Depositions Upon Oral Examination—Subdivision (a)—Notice of Examination: Time and Place**

*LeRoy Burris v. American Chicle Company.* (Eastern District of New York, GALSTON, D. J., Oct. 20, 1939).

1. A notice to take depositions must name the person to be examined or designate him by description sufficient to identify him. Designation of a person as the "superintendent or caretaker in charge of the premises" is compliance with the Rule.

2. Matters clearly within the knowledge of the moving party may not be inquired into by him on an examination before trial.

[EDITORIAL NOTE: The decisions have not been in complete harmony on the question whether, on an examination before trial, a party may inquire into matters within his own knowledge. The instant case is in accord with *Norton et al. v. Cooper Jarrett, Inc., et al.* (N. D. N. Y., Dec. 28, 1938) 11 Bull. 10.

On the other hand, *Nichols v. Sanborn Co.* (D. Mass., Sept. 30, 1938) 1 Bull. 2, 24 F. Supp. 908, *Laverett v. The Continental Briar Pipe Co.* (E. D. N. Y., Oct. 26, 1938) 3 Bull. 5, 25 F. Supp. 80, and *Benevento et al. v. A. & P. Food Stores, Inc.* (E. D. N. Y., Jan. 14, 1939) 13 Bull. 23, 26 F. Supp. 424, held the other way. As one purpose of depositions is to enable the moving party to secure evidence for introduction at the trial, and another object is to limit the scope of the issues, it would seem that a party may well be permitted to take depositions even as to facts as to which he has knowledge.

The latitude contemplated by the discovery provisions of the Rules generally, was indicated in *Lewis v. United Air Lines Transport Corporation et al.* (D. Conn., June 7, 1939) 38 Bull. 16, 27 F. Supp. 946, in which Judge Hincks said: "In any event, the only limitation on the scope of examination under Rule 26 is that the subject matter shall not be privileged and shall be 'relevant to the subject matter involved in the pending action.' The examination, under the rule, is not to be restricted to matters which are material or admissible." (See also Editor's Note following *Norton et al. v. Cooper Jarrett, Inc., et al.* (N. D. N. Y., Dec. 28, 1938) 11 Bull. 10.)]

**RULE 33—Interrogatories to Parties**

*Mamie Morgan Slydell v. Capital Transit Co.* (District of Columbia, PROCTOR, D. J., Oct. 6, 1939).

Interrogatories to parties are too late if served at the pre-trial hearing, except as to some newly developed situation.

*The Stanley Works et al. v. The C. S. Mersick & Company.* (District of Connecticut, HINCKS, D. J., Oct. 9, 1939).

1. That the information sought by interrogatories in a patent suit as contained in Patent Office trade-mark registrations is not a valid objection to the interrogatories.

2. While a party may be compelled by interrogatories to produce an existing photograph, he may not be required to incur the expense of taking a photograph.

[EDITORIAL NOTE: Query, whether the production of a photograph or other paper should not be secured by a motion to produce it under Rule 34 rather than by an interrogatory. See *O'Rourke v. RKO Radio Pic-*

*tures, Inc.*, (D. Mass.) 32 Bull. 28, 27 F. Supp. 996. The court's conclusion in the instant case that a party may not require his adversary to take photographs seems fortified by Rule 34, under which a party desiring to obtain a photograph of a pertinent object may move for permission to take such photograph himself.]

**RULE 34—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing**

*Mamie Morgan Slydell v. Capital Transit Co.* (District of Columbia, PROCTOR, D. J., Oct. 6, 1939).

1. Production of documents which are not admissible in evidence, except possibly as a means of contradicting a witness at the trial, should be denied.

2. A motion for the production of documents is too late if made at the pre-trial hearing.

3. Interrogatories to parties are too late if served at the pre-trial hearing, except as to some newly developed situation. (Rule 33)

*Federal Life Insurance Company v. Michael Holod.* (Middle District of Pennsylvania, WATSON, D. J., Oct. 31, 1939).

1. An order for the production of documents under Rule 34 may not be directed to a person who is not a party to the action.

2. Certain portions of World War Draft records are not subject to production, as the Selective Service Regulations place them beyond the process of the courts.

*Fidelity & Casualty Co., Inc. v. Tar Asphalt Trucking Co., Inc., et al.* (District of New Jersey, FAKE, D. J., Oct. 11, 1939).

Social Security records, Unemployment Compensation records and Income Tax records may be the subject of an order of discovery and production.

*Federal Life Insurance Company v. Michael Holod.* (Middle District of Pennsylvania, WATSON, D. J., Oct. 31, 1939).

1. An order for the production of documents under Rule 34 may not be directed to a person who is not a party to the action.

2. Certain portions of World War Draft records are not subject to production, as the Selective Service Regulations place them beyond the process of the courts.

**RULE 39—Trial by Jury or by the Court—Subdivision (b)—By the Court**

*Rebecca Gruskin v. New York Life Insurance Company.* (Western District of Pennsylvania, GIBSON, D. J., Sept. 15, 1939).

While the time within which to serve a demand for trial by jury should not, under ordinary circumstances, be enlarged when failure to make the demand was due solely to inadvertence of counsel, nevertheless in a case removed from a state court when the Rules had not been in effect a long time and lawyers were not fully familiar with their requirements, a motion for a jury trial presented approximately two months after time to demand a jury has expired was granted as a matter of discretion.

**RULE 41—Dismissal of Actions—Subdivision (b)—Involuntary Dismissal: Effect Thereof**

*Mrs. B. G. Botkins et al. v. Ray Sorter.* (Western District of Louisiana, Shreveport Division, DAWKINS, D. J., Sept. 15, 1939).

Failure to serve a bill of particulars as directed is

ground for dismissing the action on motion of adverse party.

**RULE 43—Evidence—Subdivision (a)—Form and Admissibility**

*John J. McCarthy v. Howard S. Palmer et al.* (Eastern District of New York, MOSCOWITZ, D. J., Oct. 16, 1939).

1. Documents produced for inspection become admissible on behalf of the producing party even if the demanding party refuses to place them in evidence, although the state rule may be to the contrary.

2. A party should not be permitted to examine affidavits and similar materials secured by another party by independent investigation incident to the preparation of the latter's case for trial, except in the most unusual circumstances. (Rule 26 (b))

**RULE 45—Subpoena—Subdivision (d)—Subpoena for Taking Depositions, Place of Examination**

*Leona Richard Fox et al. v. H. G. House et al. United States of America*, intervenor. (Eastern District of Oklahoma, RICE, D. J., Oct. 13, 1939).

1. In an action for accounting, a subpoena for the production of documentary evidence bearing not on plaintiff's right to an accounting but on the actual accounting, may be issued in advance of the trial of the main issue.

2. The issuance of a subpoena for the production of documentary evidence requiring production of voluminous records at great expense by a person other than a party to the action, may be conditioned upon the advance of the reasonable cost thereof by the person seeking the subpoena.

3. Issuance of a subpoena for the production of documents should be deferred until after determination of the question of jurisdiction.

**RULE 52—Findings by the Court—Subdivision (a)—Effect**

*United States Trust Company of New York et al. v. Mary Pouch Sears*. (District of Connecticut, CLARK, C. J., Oct. 16, 1939).

Formal findings of fact are not required if all statements of fact made on behalf of either party are admitted in the pleadings.

*Stonega Coke & Coal Co. et al. v. Samuel Price et al.* (Circuit Court of Appeals for the Fourth Circuit, PARKER, C. J., Aug. 28, 1939).

The findings of a master confirmed by the trial court in a case in which there is a great volume of conflicting evidence, should not be set aside unless clearly erroneous.

**RULE 54—Judgments: Costs—Subdivision (d)—Costs**

*Reconstruction Finance Corporation v. J. G. Menihan Corp. et al.* (Western District of New York, BURKE, D. J., Oct. 19, 1939).

Costs may not be imposed against the Reconstruction Finance Corporation, since it is an agency of the Federal Government.

**RULE 56—Summary Judgment—Subdivision (a)—For Claimant**

*United States v. Long Island Drug Company, Inc., et al.* (Eastern District of New York, MOSCOWITZ, D. J., Oct. 6, 1939).

1. The Government, in aid of collecting a tax,

brought suit to recover a debt owing by defendant to taxpayer. The defendant pleaded that he owed taxpayer nothing at time of demand for tax; and that the tax assessment was illegal because based on information obtained by illegal search and seizure. The Government moved for summary judgment. *Held*, defenses are insufficient and summary judgment should be rendered for plaintiff.

2. Doubt is expressed whether an affidavit by counsel is sufficient on a motion for summary judgment, in the absence of adequate explanation of failure to submit an affidavit by a party. (Rule 56 (e))

*Fannie Fink v. The Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin v. Virginia C. Wolf et al.* (Eastern District of Michigan, Southern Division, PICARD, D. J., Oct. 12, 1939).

1. Summary judgment may properly be granted in an action to recover the benefits under a life insurance policy, there being no disputed question of fact and the only question being one of law as to the construction of the clause designating beneficiaries.

2. In an action to recover the benefits under a life insurance policy by the administratrix of the estate of the beneficiary, other contingent beneficiaries to whom the benefits had already been paid, may be brought in as third-party defendants. (Rule 14 (a))

**Subdivision (e)—Form of Affidavits; Further Testimony**

*United States v. Long Island Drug Company, Inc., et al.* (Eastern District of New York, MOSCOWITZ, D. J., Oct. 6, 1939).

Doubt is expressed whether an affidavit by counsel is sufficient on a motion for summary judgment, in the absence of adequate explanation of failure to submit an affidavit by a party.

**RULE 57—Declaratory Judgments**

*Caterpillar Tractor Company v. International Harvester Company*. (Circuit Court of Appeals for the Ninth Circuit, STEPHENS, C. J., Oct. 4, 1939).

In an action for declaratory judgment to establish non-infringement by plaintiff of defendant's patent, judgment on the pleadings should not be granted if there is a genuine issue as to the existence of an actual controversy as a basis for declaratory relief.

*Adelaide B. Lewis v. The United Air Lines Transport Corporation et al.* (District of Connecticut, HINCKS, D. J., Oct. 4, 1939).

In an action for wrongful death resulting from an airplane accident, the defendant operating company is not entitled to maintain a cross-claim for a declaratory judgment establishing its right to indemnity from its co-defendant, manufacturer of the plane, in respect to death claims of other persons than the plaintiff.

*George E. Wilder v. John Doe*. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Oct. 16, 1939).

In the exercise of discretion the court declined to take jurisdiction of an action for a declaratory judgment brought against a fictitious person.

*George E. Wilder v. John Doe*. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Oct. 16, 1939).

In the exercise of discretion the court declined to take jurisdiction of an action for a declaratory judgment brought against a fictitious person.

**RULE 60—Relief from Judgment or Order—Subdivision (b)—Mistake; Inadvertence; Surprise; Excusable Neglect**

*Oliver B. Cassell v. Lottie Barnes.* (District of Columbia, PROCTOR, D. J., Oct. 5, 1939).

Judgment by default entered on personal service may not be set aside on motion made more than six months after entry of judgment.

**RULE 65—Injunctions—Subdivision (c)—Security**

*Pennmac Corporation et al. v. Falcon Pencil Corporation.* (Southern District of New York, LEIBELL, D. J., July 5, 1939).

Issuance of a preliminary injunction should be conditioned upon the deposit of security in a specified sum for the payment of such costs and damages as may be sustained by the party enjoined, if he is found to have been wrongfully enjoined.

**RULE 69—Execution—Subdivision (a)—In General**

*Samuel Burak v. Charles Scott et al.* (District of Columbia, MORRIS, J., Oct. 18, 1939).

1. A judgment creditor may take the deposition of his judgment debtor in aid of execution.

2. A judgment creditor may not require persons other than the judgment debtor to disclose their assets. (Rule 26 (a))

**RULE 73—Appeal to a Circuit Court of Appeals—Subdivision (g)—Docketing and Record on Appeal**

*In the Matter of Guanajuato Reduction and Mines Company, Debtor.* (District of New Jersey, AVIS, D. J., Oct. 26, 1939).

The forty days within which to file the record on appeal begins to run from the date of the actual filing of the notice of appeal and not from some other date appearing in the date line of the notice.

**RULE 81—Applicability in General—Subdivision (c)—Removed Actions**

*T. A. Galloway v. General Motors Acceptance Corporation.* (Circuit Court of Appeals for the Fourth Circuit, HENRY J. WATKINS, D. J., Aug. 28, 1939).

In an action removed from a state court to recover both actual and punitive damages, the plaintiff, who has been awarded actual damages only, may appeal from the judgment, even though the state practice may be to the contrary.

**RULE 82—Jurisdiction and Venue Unaffected**

*Gertrude Mead Morrell v. United Air Lines Transport Corporation v. United Aircraft Corporation et al. Pauline I. Lickel v. United Air Lines Transport Corporation v. United Aircraft Corporation et al.* (Southern District of New York, GODDARD, D. J., Oct. 26, 1939).

The jurisdictional and venue requirements of an independent action need not be met in a third-party proceeding, since such proceeding is ancillary to the original action.

Permitting a defendant to bring in a third-party defendant without an independent basis of jurisdiction and without showing independent venue requirements does not constitute an extension of the jurisdiction or venue of the court in contravention of Rule 82.

**RULE 86—Effective Date**

*American LaFrance Fire Engine Company, Inc., to the use of American LaFrance and Foamite Industries, Inc. v. Borough of Shenandoah.* (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Oct. 11, 1939).

In an equity action commenced prior to the effective date of the Rules, but decided subsequently, the fact that the plaintiff may have had an adequate remedy at law becomes immaterial and does not constitute a ground for dismissing the action.

*Stewart-Warner Corporation v. Universal Lubricating Systems, Inc.* (Western District of Pennsylvania, SCHOONMAKER, D. J., Oct. 17, 1939).

In an action for patent infringement commenced before the Rules became effective, a counterclaim for damages under the antitrust laws, which is triable of right by a jury, held proper, even though filed before such date, on a motion to dismiss filed before but coming on to be heard after such date.

A counterclaim was filed prior to effective date of new Rules, but a motion to dismiss it came on to be heard subsequently to such date. By that time, a separate action on the claim would have been barred. Held, the propriety of the counterclaim should be determined under the new Rules.

**DECISIONS ON FEDERAL RULES OF CIVIL PROCEDURE**

Supplemental cumulative list of cases published in Department of Justice Bulletins, that are also reported in Federal Reporter system.—This list supplements the list published in the November issue of the JOURNAL, page 967.

**ALEXANDER HOLTZOFF**

*Special Assistant to the Attorney General*

**ALLEN R. COZIER**

*Special Attorney*

**Rule 1**

*Cities Service Oil Co. v. Dunlap, et al.* (C. C. A. 5) 101 F. (2d) 314.

**Rule 2**

*Partridge et al (Martin et al., Interveners) v. Ainley et al.* (S. D. N. Y.) 28 F. Supp. 472.

**Rule 8**

*Subdivision (a)*

*Heddon's Sons, James v. Callender* (D. Minn.) 28 F. Supp. 643.

*James Heddon's Sons v. Callender* (D. Minn.) 28 F. Supp. 643.

*Moreschi et al. v. Mosteller et al.* (W. D. Pa.) 28 F. Supp. 613.

**Rule 12**

*Subdivision (b)*

*Alabama Independent Service Station Ass'n., Inc., et al. v. Shell Petroleum Corporation et al.* (N. D. Ala.) 28 F. Supp. 386.

*Goodman et al. v. United States* (S. D. Iowa) 28 F. Supp. 497.

*Subdivision (e)*

*Sure-Fit Products Co. v. Med-Vogue Corporation et al.* (E. D. Pa.) 28 F. Supp. 489.

**Rule 17***Subdivision (b)*

Ballard v. United Distillers Co., Inc., et al. (W. D. Ky.) 28 F. Supp. 633.

**Rule 26***Subdivision (a)*

Jiffy Lubricator Co. v. Alemite Co. et al. (D. N. Dak.) 28 F. Supp. 385.

*Subdivision (b)*

Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation et al (C. C. A. 2) 105 F. (2d) 981.

**Rule 33**

McInerney v. Wm. P. McDonald Const. Co. (E. D. N. Y.) 28 F. Supp. 557.

**Rule 54***Subdivision (c)*

Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation (W. D. Pa.) 28 F. Supp. 586.

**Rule 56***Subdivision (a)*

Hartford Accident & Indemnity Co. v. Flanagan (S. D. Ohio) 28 F. Supp. 415.

*Subdivision (b)*

Heart of American Lumber Co. v. Belove (W. D. Mo.) 28 F. Supp. 619.

*Subdivision (c)*

Schram v. Clair et al. (E. D. N. Y.) 28 F. Supp. 422.

**Rule 65***Subdivision (c)*

Penmac Corporation et al. v. Falcon Pencil Corporation (S. D. N. Y.) 28 F. Supp. 639.

**Rule 73***Subdivision (a)*

Collins v. Metro-Goldwyn Pictures Corporation et al. (C. C. A. 2) 106 F. (2d) 83.

*Subdivision (b)*

Martin v. Clarke (C. C. A. 7) 105 F. (2d) 685.

**Rule 75***Subdivision (a)*

Cloud v. McLean-Arkansas Lumber Co. et al. (E. D. Ark.) 28 F. Supp. 623.

**Rule 86**

Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation (W. D. Pa.) 28 F. Supp. 645.

**HIS OWN LAWYER**

"We have been embarrassed by the fact that defendant, a layman, has presented his case here without aid of his attorneys, except that they have submitted a brief, which, with all the other material in the case, has had our careful consideration. The whole argument for defendant is that the jury should have believed him rather than plaintiff and the latter's witnesses. It is not our province to determine what the truth was. We do not pretend to have done so. It is compelling upon us that the record shows substantial evidence in support of the verdict. To overturn the de-

cision of those who, under our constitution and laws, have the duty of final determination would be a violation by us of the constitutional law of the state, an aspect of the case which apparently has not heretofore been brought home to defendant. When it is, as it must be by this decision, he, as much as any informed and law-abiding citizen, can be depended upon, not for that acquiescence which comes from agreement, but for that yielding to the authority of law and government which is the duty of every citizen."—Chief Justice Stone in *Meyer v. Agren*, 287 N.W. 680 (Supreme Court of Minnesota, Oct. 6, 1939.)

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1939-1940

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# JUDGMENTS NON OBSTANTE VEREDICTO: PROCEDURAL OR SUBSTANTIVE QUESTION?

Circuit Judge (formerly Dean) Clark in *Guardian Life Ins. Co., v. Clum*, 106 F. 2d 502 (C. C. A. 3, Sept. 14, 1939):

"Plaintiff-appellee leans heavily, and, under *Erie R. Co. v. Tompkins* . . . properly, on two doctrines of the Pennsylvania courts. . . . The second is the narrow scope of the court's power to enter judgments *non obstante veredicto*. . . .

We do not intend to spend much time on the Pennsylvania rules governing judgments *n.o.v.* Here again we find the courts of that State occupying an isolated position. Their requirement of admissions or documents in corroboration of even contradicted testimony seems to bottom rather on the history of judgments *n.o.v.* at common law, 33 C. J. 1184, than upon the speedy accomplishment of justice. . . . We also reserve for some appropriate time an interesting and complicated question arising out of the Supreme Court's decision in *Erie R. Co. v. Tompkins*, above cited. That question is the latter case's application to the entering of directed verdicts and judgments *n.o.v.* A cogent argument for putting the exercise of the *n.o.v.* power in a category with *res ipsa loquitur*, presumptions and burden of proof, might be made. Such an argument leads to its consideration as a procedural rather than as a substantive question and the consequent inapplicability of the *Erie R. Co. v. Tompkins* rule."

## TO EACH MEMBER OF THE ASSOCIATION:

Do all of your associates belong to the American Bar Association?

Every lawyer benefits himself, as well as his profession, by aligning himself with the American Bar Association which, through its publications, committees and sections, enables the individual lawyer to keep informed upon what is being done in his profession.

Will you please sponsor a new member by having one of your associates or acquaintances fill out and sign, and send to the Association, the application form printed below? The annual dues are \$8.00 (\$4.00 for members who have been admitted to the bar less than five years). Applications presented during December should be accompanied by check for one-half of one year's dues covering the remainder of the fiscal year ending June 30, 1940.

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## NOTICE BY THE BOARD OF ELECTIONS

The following states will elect a State Delegate for a three-year term in 1940:

Arkansas	Louisiana	Ohio
Colorado	Maryland	Oregon
Delaware	Minnesota	Rhode Island
Georgia	Nevada	Utah
Idaho	New Hampshire	West Virginia
Indiana	New York	

The following states will elect a State Delegate to fill vacancies for a term to expire at the adjournment of the 1941 Annual Meeting:

New Mexico	Territorial Group	(Alaska, Canal Zone, Philippine Islands)
Wisconsin		

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1940 Annual Meeting:

Arkansas	Delaware	West Virginia
Colorado	Rhode Island	

Any additional vacancies which may occur prior to February 15, 1940, will also be filled at the general election.

Nominating petitions for all State Delegates to be elected in 1940 must be filed with the Board of Elections not later than April 12, 1940. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on April 12, 1940.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1940 Annual Meeting of the Association.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group)."

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL.

While there is no restriction on the maximum

number of names which may be signed to a nominating petition, in the interest of conserving space in the JOURNAL the Board of Elections suggests that not more than fifty names be secured to a nominating petition.

EDWARD T. FAIRCHILD,  
Chairman of the Board of Elections.

## Advisory Council Plan Adopted by Chicago Bar Association

A NOVEL plan for enlarging the scope of membership participation in bar association activities was adopted by the Board of Managers of the Chicago Bar Association on Nov. 16, 1939. The plan, which is presented in full by President Tappan Gregory in the November number of the *Chicago Bar Record*, will give all members the opportunity of joining "advisory councils" for association committees. Membership in a council will be purely voluntary. It will have no organization of its own. Its field will be discussion, its action a recommendation to the committee. Its meetings will be held upon the call of the chairman of the committee, in each case guided, of course, by the character of the problems being considered and the likelihood of their appeal to the members of the council. Members of the committee will regard themselves as members of the council. Every meeting will be presided over by the chairman or vice-chairman of the committee.

"The agenda for these meetings," says Mr. Gregory, "should be carefully organized, looking to a lively discussion, intelligently led. If this is done, then we shall in each case provide a forum where there may be a full and free discussion and an interchange of ideas among those with a common interest with results of real value. Should there be a serious difference of opinion between committee and council, the presiding officer would be obligated to entertain motions for the adoption of resolutions or memorials by the council for presentation to the committee and he must be prepared to submit to his committee those duly adopted, to require its action thereon, and to advise the Board of Managers either formally by way of a report or informally by conference with the president or the vice-president assigned to the committee."

### Trial Practice Talks Draw Large Audiences

A series of four afternoon lectures on "The Trial of a Law Suit" in October and November brought record crowds to the quarters of the Chicago Bar Association. The dining-room, corridor, and lounge were packed with members and law students eager to get advice about problems of trial practice from experienced Chicago lawyers. Between 600 and 750 persons attended on each occasion, making it necessary to carry the talks to the more remote parts of the audience over the public address system.

The series was arranged by the committee on activities of younger members, headed by Donald L. Vetter. The speakers and subjects were as follows: Royal W. Irwin on PREPARATION, John H. Hinshaw on PRE-TRIAL PRACTICE AND TECHNIQUE, A. R. Peterson on THE JURY, and Francis X. Busch on TRIAL PRACTICE.

## BRIEF NOTES

A learned correspondent in Oklahoma calls our attention to an error in a letter to a newspaper, copied by the JOURNAL in its October issue, concerning the spelling of Chief Justice White's middle name. In this letter the date of the Chief Justice's commission was given wrongly. The correct date is Feb. 19, 1894. Judge Bierer, who mentioned this to us, went on the Oklahoma Supreme Court a month and two days earlier. . . . Another learned correspondent writes us:

"On page 394 of the November issue of the *Journal*, Mr. Stevens T. Mason states that: 'An assignment like any other contract must, of course, have consideration. . . .'

. . . First, an assignment is not a contract; and second, an assignment, in order to be effective, does not have to be supported by a consideration. See Restatement of Contracts, Vol. 1, Secs. 149 and 150.

"Perhaps Mr. Mason was thinking of a contract to make an assignment. Otherwise, the article is very interesting and instructive."

. . . The Atlanta Journal of Saturday, Oct. 28, printed the following:

"Mrs. Lillie Mae Childers, who had obtained a judgment for \$500 against the Atlanta Coca-Cola Bottling Company in Fulton Superior Court, sought to dismiss an appeal on the grounds that Judge E. D. Thomas died before verifying the bill of exceptions.

"Verification of the bill by Clifford E. Thomas, secretary to Judge Thomas, was attacked on the grounds that Mr. Thomas was not a practicing attorney and had not paid a professional tax for the past three years.

"The Court of Appeals pointed out that the law permits verification of a bill of exceptions by a member of the bar who was in the courtroom while the case was on trial.

"A person can be a member of the bar and still not be entitled to practice law," the Court of Appeals held."

. . . A mechanical error (line dropped out) in the account of the rare law-book exhibit at the San Francisco meeting made this paragraph meaningless:

"Particular interest attached to a sumptuously printed work catalogued as follows:

"Georgius Agricola *De re metallica*, translated from the first Latin edition of 1556 by Herbert Clark Hoover (A. B., Stanford University) and Lou Henry Hoover. London, 1913."

. . . One of the most delightful books of legal reminiscences is *The Old Munster Circuit*, by Maurice Healy (published by Michael Joseph, Ltd., 26 Bloomsbury St., London.) A few sentences from the preface will give a taste of the book's quality:

"I was speaking about the old days in Ireland, and one thing was suggesting another. But there should have been two or three of us to remember in unison. The best talk in the world is to be heard in Cork, where two or three are gathered together. All speak at once, but there is both art and method in it. Talk of Haydn's Quartets! As works of art they take second place to a Cork conversation. Palestrina was a Cork man; there is internal evidence in his music. . . . The idiom is there: one voice starts, but is almost immediately joined by a second and a third which descant about the first, adding to it, embellishing it, and sometimes even contradicting it, but never interfering with the story. Through all the apparent confusion there is pleasant repetition of the main theme; and all parts enjoy themselves thoroughly. Whether a musician would pass this as a good description of the music of Pope Marcellus's Mass, it cannot be criticized as a portrayal of a Cork conversation."

## ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia . . . . . (13th & Chestnut)	\$3.50-5.00	\$5.00-6.00	\$6.00- 8.00	\$12.00-25.00
Barclay . . . . . (18th & Ritten- house Sq. E.)		6.00	7.00-10.00	12.00-18.00
Bellevue-Stratford (Broad & Walnut)	3.50-5.00	5.00-7.00	6.00- 8.00	12.00-15.00
Benjamin Franklin (9th & Chestnut)	3.50-5.00	5.00-6.00	6.00- 8.00	12.00-14.00
Drake . . . . . (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex . . . . . (13th & Filbert)	3.00-3.50	5.00-6.00	7.00	
McAlpin . . . . . (19th & Chestnut)	2.25-2.75	4.00	4.50- 5.00	
Majestic . . . . . (Broad & Girard)	2.50-3.00	4.00-5.00	5.00	8.00-12.00
Philadelphian . . . (39th & Chestnut)	3.00-4.00	5.00-5.50	6.00- 8.00	9.00-20.00
Ritz-Carlton . . . . (Broad & Walnut)	4.30-5.00		7.00- 8.00	10.00-12.00
St. James . . . . . (13th & Walnut)	3.00		5.00- 6.00	
Stephen Girard . . (2027 Chestnut St.)	2.75-3.25	4.50-5.50	5.50	
Sylvania . . . . . (13th & Locust)	3.00	6.00	6.00	10.00-12.00
Walton . . . . . (Broad & Locust)	2.50-4.00	4.00-5.00	5.00- 6.00	8.00-12.00
Warburton . . . . . (20th & Sansom)	3.00		5.00	
Warwick . . . . . (17th & Locust)	4.50-5.50		7.00- 8.00	12.00-14.50
Wellington . . . . . (19th & Walnut)	4.00		6.00	8.00

### EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, first and second choice of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

## Washington Letter

(Continued from page 991)

Butler was nominated to the Supreme Court by President Harding. His period of service was nearly 17 years.

Justice and Mrs. Butler (Annie Cronin) were married in 1891. They had eight children. One of his daughters, Mary, died during the World War while serving as an army nurse. Four of his sons saw military service during the war. He is reported to have said that there should be no legislation which would hamper any poor youth in making his way to the top. The Justice's pastime was golf which, it has been said, he played with more enthusiasm than success. His avocation was raising pure-bred Hereford cattle on his 538-acre farm, purchased early in 1938 in Carroll County, Maryland, near Woodbine. He called his place Waterford, after the township where he was born in Minnesota.

Mr. Justice Butler held honorary LL.D. degrees from Carleton and Amherst Colleges and from the Catholic University of America. He was selected because of his special experience to write some of the Court's opinions in ratemaking and municipal utility valuation cases. However, he disqualified himself in those freight rate, railroad valuation, and utility cases where he might have had an interest or a predilection. In a resumé made of the 27 New Deal cases decided by the Court prior to the fall term of 1937, it is said that Justice Butler was against the present administration 17 times, but that in only six of these instances was he in the minority. Some of those officials who differed with him most definitely have, nevertheless, paid high tribute to his complete frankness, his clear intellect, and his rugged integrity.

### Legal Education Section Recommends

The recommendations of the Association's section of legal education and admissions to the bar, in respect to qualifications of applicants for legal positions in the service of the United States government, were presented recently to the President's committee on civil service improvement. The prepared outline statement, signed for the section by its chairman, Charles E. Dunbar, Jr., of New Orleans, observed that the government's problem is largely that of selecting the most competent from the applicants presenting themselves, and then proceeded to discuss the question, in part as follows, of what are the qualifications now in existence for lawyers in the United States:

"Forty-one states require, either presently or prospectively, two years of

college education or in some instances its equivalent before admission to the bar. Forty-one jurisdictions also require a minimum of three years or more of legal education. Four jurisdictions require graduation from a law school approved by the American Bar Association. . . .

"The standards of the American Bar Association are designed as a guide to law schools and to bar admission authorities. They were adopted and have been pushed for the benefit of the public. It should be realized that the American Bar Association does not contend that it is impossible for an individual to become a good lawyer unless he is graduated from a law school approved by the American Bar Association. The kind of training set forth in the standards which define an approved school is regarded as the type of training which the public is entitled to expect of a lawyer admitted to the bar today. . . .

"With forty-one states demanding two years of college education, this would seem to be an irreducible minimum. The increasing complexities of legal practice and the ample opportunities afforded in every state for a college education, amply justify this requirement.

"The days when a good education could be obtained in a law office are past. Apprenticeship is an outmoded method of legal education. Graduation from a resident law school should be required and it should be a school which has a three year course if full time or a four year course if part time. This distinction between length of courses for a full time and a part time school is warranted by reason of the fact that a very great majority of part time students are earning their way, and therefore do not have the same time or opportunity for study as the full time students. This means that their load must be lightened and the course should be stretched out over a four year period. This distinction between full and part time schools is recognized in a majority of the states.

"The American Bar Association requirement of graduation from a full time school would work out to the advantage of the government as to the classification under consideration in the great majority of cases. If the President's committee does not consider it feasible to recommend it, it should recommend that the type of law school attended should have careful consideration, including whether or not the school attended was approved by the American Bar Association at the time of graduation."

In respect to lawyers having experience in practice, the section's state-

ment said: ". . . it is realized that the individual who has proved himself to be a capable lawyer in the actual practice should not be shut out from a government position whatever type of education he has had. Therefore, a difference should be made in the required qualifications of lawyers who have practiced for a substantial period of time and those who have not."

By way of conclusion, the statement continued: "It is, therefore, recommended that the President's committee establish a definite requirement of two years of pre-legal college education, plus graduation from a resident law school having a three year course if full time or a four year course if part time, plus admission to the bar, for all candidates for legal positions in the government, except those who have practiced a substantial length of time; that is, at least five years. It also is recommended that the type of legal training obtained, including the kind of law school attended and whether or not it was approved by the American Bar Association, should be considered in making appointments in this class."

### Employees of Court Clerk Protected Against Political Assessment

The *Bar Bulletin* (Boston) for September, 1939, has a thought-provoking page and a half by Reuben L. Lurie on the "Connolly case." In the winter of 1937-38 a lawyer standing at the counter in the Clerk's Office for civil business of the Suffolk Superior Court saw two young women clerks weeping. He inquired into the incident, and found that word had been spread that it would be necessary for the employees in the clerk's office to raise, in the near future, seven per cent. of the total salaries for four years as a contribution to the clerk's 1940 campaign. The lawyer made a quiet investigation over a period of a year and in April, 1939, the bar association of the City of Boston took the matter up. One woman clerk, who had been employed in the clerk's office for many years, worried herself almost into a nervous breakdown when she learned that her assessment would be more than \$600, and that if she lost her position she would lose with it her home, and security for herself and her dependents. It was with relief and joy that news was received that the Bar Association had gone into action. An information against the clerk was filed in the Supreme Judicial Court on June 16, and the case was set for hearing on July 24. Five days before this date arrived the clerk resigned.

## Current Events

(Continued from page 990)

conform to the new federal rules. Mr. Van Cise's remarks were as follows:

The Colorado Bar Association, under its president, George Dexter Blount, has made one of its goals the revision of the 1887 code to conform to the federal rules.

At the annual meeting of the State bar association last fall the Colorado lawyers unanimously asked the supreme court to effectuate that reform. Later the association introduced a bill in the general assembly to empower the court to prescribe procedure in courts of record by rule. This was unanimously passed, and at once approved by the governor, on Feb. 25, 1939.

In preparation for the task the code and rules were thoroughly studied and two sets of dummies prepared, one for the chairman, and one for the committee members. These dummies are the cut-out and pasted-up sections of the rules and subdivisions thereof, one to a page, with the corresponding cut-out sections of the code in juxtaposition thereto.

This resulted in some interesting problems. About one-third of the code is not covered by the rules, while a few rules are applicable only to federal courts. How shall they be numbered? We decided to follow the rules as a numerical guide; that where a rule is inapplicable its number or subsection will be left blank, and where the code is essentially state procedure new numbers will be given to its sections commencing with number 101. As there are 86 rules, this leaves fourteen numbers for their expansion, and starts the State code provisions with new basic designations.

The next problem is, while we are revising the code, should we improve the rules? We have not yet passed upon that question and probably will not do so for some months, but as an example the matter of contempt is treated in our code in a separate chapter, and also appears in ten other sections. But the rules have no separate section for contempt, yet scatter that subject between Rules 37(b), 45(f), 53(d)2, 56(g), and 70. Is there any valid reason against combination in one place?

If there is none, how about the duties of the clerk? Rules 77 and 79 apply to his duties and books, but his duties are also mentioned in twelve other places.

### Where Code and Rules Vary

Then there are certain rules which radically alter the State practice, and need study to determine whether the code provision is not very much prefer-

able. For instance under code practice a deposition can be taken any time after filing the complaint or serving the summons; under the rule this can only be done by leave of court before answer, which is a real hardship to country lawyers, and a detriment to the quick action which is so necessary in defending legal "blackmail" cases, injunctions, or personal injury actions. Also, under our practice, the lawyer may sign the summons, and the action may be commenced by serving the summons alone, and filing the complaint within ten days. Under the rules the complaint is filed with the clerk, who then issues process.

The scope of the work is tremendous, and the bar association has no funds to employ help, as the federal committee did. Hence the work has been divided into subcommittees, and each member thereof has been given his section of the dummy with definitely allotted rules and code sections. There are thirteen of these groups, with their assignments as follows:

### Reconciliation Work Divided Up

No. 1. Initiation of actions, Rules 1 to 6, 45, 71, 85 and 86.

No. 2. Pleadings, Rules 7 to 13 and 15 and 16.

No. 3. Parties, Rules 14 and 17 to 25, inclusive.

No. 4. Depositions and discovery, Rules 26 to 37, inclusive.

No. 5. Trials, Rules 38 to 44, inclusive, and 46 to 53, inclusive.

No. 6. Judgments, Rules 54 to 63, inclusive, and 68 and 70.

No. 7. Provisional and final remedies, Rules 64 to 69, inclusive.

No. 8. Appellate procedure, Rules 72 to 76, inclusive.

No. 9. District and county courts and clerks, Rules 77 to 83, inclusive.

No. 10. Code remedies and miscellaneous,—mandamus, affidavits, arbitration, certiorari, contempt, usurpation of office, attachments, garnishment, replevin, and venue.

No. 11. Real property,—disputed boundaries, foreclosure of mortgages, lis pendens, possession of realty, quiet title, recovery of realty.

No. 12. Statute committee; to search all the statutes for sections which belong in the code.

No. 13. Committee on forms; this takes in forms prescribed by the federal rules and all forms in the code, and drafting new forms for Colorado use.

The cardinal principle involved in the work will be to adopt the rule verbatim, if possible, and, if not, to rewrite it for state procedure with as little change as possible.

Where code sections are not covered by the rules, they will be rewritten,

shortened, and "streamlined," so that they may be adapted to the modern trend of the rules.

### Sub-Committees at Work

Each sub-committee deals with sections which pertain generally to the same subject-matter, hence they will hold separate conferences to discuss their portions of the redrafted code and rules.

Each member will submit his proposal or counter proposal, the group will review his work, and as rules are adopted by it they will be submitted to the committee as a whole.

The entire committee, now consisting of seventy-five members, will meet monthly in the senate chamber in Denver to discuss the reports of the subcommittees. Each group will furnish the chairman with a list of prepared rules in advance, so that these will be placed upon the agenda for the evening. Rules will be tentatively adopted until the entire revision is accepted. Then it will all go to a revision committee for scanning, and from it go back to the full committee. When adopted by it, the draft will be printed, a copy mailed to every lawyer in the state, and discussion held in the local bar committees. When they make their reports the revision committee will again meet, draw up its report to the supreme court and submit the results.

Thirty-three pages of work sheets were prepared for the committee. These consisted in rather elaborate discussions of the work, numerical key tabulations of the Code to the rules, and the rules to the code and present supreme court rules, names of the committees and their respective assignments. With these and their respective portions of the dummy, the committees have been co-ordinated.

### Completion Hoped by January First

This is not a matter which can be hurried, neither should it be allowed to lag. We would like to finish by January 1, 1940, but time alone will disclose the amount of work involved. However, Colorado is definitely on its way to one procedure in both State and federal courts.

### Arizona

The supreme court of Arizona has adopted a set of rules, effective Jan. 1, 1940, based on a short enabling act. These rules, a 114-page booklet, have been printed and distributed by the State bar. The preface says:

"These rules have been adopted by the supreme court under chapter 8, infra, after lengthy and careful consultation with an advisory committee chosen by the board of governors of the state bar, and consisting of Messrs. J. Early Craig, Carl G. Krook, George

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R. Darnell, E. T. Cusick and Norman S. Hull. They are, in substance, the new Federal Rules of Civil Procedure, modified in a few instances to suit our local conditions. They supersede all present rules and statutes governing procedure, so far as there is a conflict, but on matters which they do not cover the present procedure remains in full force and effect.

"It may be that it will be found in actual practice that some of these rules should be modified or changed. The court will welcome suggestions from time to time from any members of the bar if their experience in the practical application of the rules indicates that a change is needed."

#### *Criminal Procedure*

The Arizona Supreme Court has also adopted rules of procedure in criminal cases, pursuant to an act approved Feb. 4, 1939, granting to the court rule-making power governing procedure in both civil and criminal matters. The rules will be effective Apr. 1, 1940. They are based on the model code of criminal procedure, prepared and approved by the American Law Institute, with a few modifications.

Arizona seems to be the first State adopting rules for criminal procedure under the rule-making power, based on the model code.

This code was adopted by the court after consultation with a committee of the state bar.

#### **University of Kansas City Cooperates with Local Bar in Legal Institute**

An ideal combination for putting on a legal institute seems to be a law school and the local bar associations. The University of Kansas City in co-operation with the Lawyers Association of Kansas City and the Kansas City Bar Association is offering a law institute to which all members of the bar are invited without charge.

#### **Committee on Unauthorized Practice Holds Meeting**

THE American Bar Association's Committee on the Unauthorized Practice of the Law's first meeting of the year was held at the Blackstone Hotel in Chicago October 20, 21 and 22, with Chairman Edwin M. Otterbourg of New York and members Henry B. Brennan, Savannah, Georgia, Paul H. Sanders, Durham, N. C., John D. Randall, Cedar Rapids, Iowa and Fred B. H. Spellman, Alva, Oklahoma, present.

Many conferences and discussions were held during the three-day session including two joint sessions with the American Bar Association's committee

on Professional Ethics and Grievances, the Conference of Lay Adjusters and a meeting with the Chicago Bar Association's committee on the Unauthorized Practice of the Law.

Subjects discussed were as follows: real estate brokers, accountants, patent office practice, practice before administrative boards and commissions, collection agencies, lay adjusters, law lists, banks and trust companies and life underwriters.

On Friday evening the 20th, the committee met with the Chicago Bar Association's committee at the headquarters of the Chicago Bar Association where Mr. Otterbourg addressed the meeting, after which a round table discussion was entered into by all present on the problems of unauthorized practice.

Mr. George E. Brand of Detroit and Mr. Martin J. Teigan of Chicago, member and secretary of the Special Committee on Law Lists appeared before the joint session with the Ethics committee to discuss combined questions of unauthorized practice and ethics confronting their committee.

Mr. Raymond Troot of Providence, R. I., Chairman of the Banks and Trust Companies Committee on relations with the bar, met with the committee where it was agreed that a restatement of the principles as regarding banks and trust companies was desired and that work on the same should be commenced immediately.

Mr. Walter F. Dodd, of the American Bar Association committee on Administrative Law appeared before the committee and discussed a few of the many problems of unauthorized practice now arising.

While the question of real estate brokers was discussed at length, no definite action was taken due to the illness of the Chairman of the committee on legal rights of the National Real Estate Board. The committee expects to resume these conferences at an early date to the end that a joint declaration can be issued by that organization and the bar in respect to certain practices. Pending this, the committee stated that it is requesting local and state bar associations in the interest of consistency to submit any proposed statements or agreements to it.

The meeting of the Conference Committee on Lay Adjusters was held Sunday the 22nd, beginning at nine o'clock. Among other business transacted at the conference were hearings upon three complaints filed, in response to the invitation of the Conference that any complaints be filed with it. Following the meeting it was announced that gratifying progress was being made on the question of lay adjusters and that the survey on practice before workmen's

compensation commissions would be continued.

The meeting was concluded with a joint conference with the representatives of the National Association of Life Underwriters and the Committee of Professional Ethics and Grievances of the American Bar Association, at which time steps were taken looking toward the adoption of a statement of principles covering certain practices of life insurance underwriters and lawyers.

#### **Opinion of Oklahoma Supreme Court on Petition for Order to Integrate Bar**

The Legislature of the State of Oklahoma passed an Act in 1929 known as The State Bar Act. . . This Act provided for the creation of the State Bar; created a Board of Governors; provided for qualifications for admission to the Bar; established rules of professional conduct and causes for disbarment.

The Seventeenth Legislature of the State of Oklahoma repealed the State Bar Act, . . . effective July 28, 1939.

The Board of Governors of the State Bar, various bar associations of the State of Oklahoma, and individuals, filed petitions herein praying that the Bar of the State of Oklahoma be integrated by order of the Supreme Court. Thereafter the Supreme Court appointed a committee of lawyers, designated as the Executive Council, and this committee likewise petitioned the Supreme Court to integrate the Bar of the State of Oklahoma, and reported its findings to the court that it was for the public interest and for the advancement and administration of justice that the Bar be integrated as a means of combating the unauthorized practice of law and improving the ethical standards of the profession. . .

There is no express grant of power in the Constitution of Oklahoma giving to any of the three departments of government the right to define and regulate the practice of law, but the very fact that the Supreme Court was created by the Constitution gives it the right to regulate the matter of who shall be admitted to practice law before the Supreme Court and inferior courts, and also gives it the right to regulate and control the practice of law within its jurisdiction.

The Supreme Court has the right to exercise all powers fundamental to its existence, and it is fundamental that it has the inherent power to regulate admission to the Bar, and to control and regulate the practice of law of those admitted to the Bar.

"As a prominent member of the bar of this country has well said:

"Being such appointees, the court has an immediate interest in the character of the bar, for the court's own sake. A good bar is a necessity for a good bench; and the labors of the latter are lightened and rendered more effective by the learning and ability of the bar, exactly as they are facilitated by efficient receivers, commissioners, referees, masters in chancery, bailiffs or probation officers; all of whom are subject to removal by the court. . . .

"But aside from the mere intellectual aid to be rendered the court by a competent bar, there is the inherent right of the court to surround itself with honest assistants who are sympathetic and will unite with it in the proper administra-

tion of justice and in maintaining that administration on a high plane. That is the main business of the court; and whatever obstructs or embarrasses its chief function, must be under its control; it cannot practically reside anywhere else." Henry M. Dowling on 'The Inherent Power of the Judiciary,' 21 AMERICAN BAR ASSOCIATION JOURNAL, 635.

"The inherent power of this court which petitioners ask us to invoke has always existed. This power is not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or fact-finding purposes and to make recommendations, but the final decision must rest with the court.

"The primary duty of courts is the proper and efficient administration of

justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.

"The prayer of the petitioners to integrate the Bar of the State of Oklahoma is granted, and the following rules creating, controlling and regulating the Oklahoma Bar Association are hereby adopted." (Here follow the Rules.)

## Ross Contest Essay

(Continued from page 1022)

his allegations, the Commissioner has no funds to bring in contrary witnesses. This district court entertains factual testimony in the case for the first time. In conformity with our general feeling toward the subject of appeals, we feel that its findings of fact should be subject to review, which requires appeal to the United States Circuit Court of Appeals, making three appeals in all. That is one appeal too many. By the time the actions of an expert examiner have been examined by the expert examiners-in-chief and the actions of the expert examiners-in-chief have been reviewed, by one appellate court, the error ought to have been squeezed out of any case. This weakness lies in handicapping the Patent Office in its ability to do a complete, first-instance job. It should have a tribunal for the taking of testimony in matters involving questions of fact, so that it would be unnecessary to appeal to a court of equity to have matters of fact considered. To establish such a fact-finding body within the Patent Office would please the courts no end by relieving them of bills in equity under R.S. 4915; would eliminate one appeal; and would improve efficiency by relieving the District Courts of Appeals, and, for once, by providing a logical, planned procedure."

### *The Judge is Satisfied*

At this point the court arose and gazed out upon the spring morning, and the clerk heard him murmur: "... greens . . . that indigestion . . . eleven years . . . new irons . . . indisposed to continue . . ." which left him in doubt whether the court was too indisposed to continue, or was merely indisposed to continue the hearing. That uncertainty, however, was considerably relieved because, as the court passed from the bench, he cast a last look back, and, like the Cheshire cat, seemed to leave a grin behind.

### FOR ATTENTION OF THE LEGAL PROFESSION

THE JOURNAL has been asked to publish the following notice:

The Supreme Council 33°, A. & A. S. R., South-

ern Jurisdiction, U. S. A., has in its possession the unpublished manuscript of an exhaustive treatise entitled "Maxims of the Roman Law, with Some of the Ancient French Laws," by General Albert Pike, former Grand Commander.

Authorities who have examined the manuscript pronounce it a comprehensive study of these old Maxims, on which so much of our modern jurisprudence is based, and appraise it as a most valuable contribution. General Pike was a distinguished jurist, as well as a student of ancient and classic lore, and this study of his is said to be a masterful production, with its subject treated on a basis wholly different from that used in any previous work.

The Supreme Council has been urged by prominent lawyers to publish this material, but it does not feel justified in doing so unless there is likely to be a sufficient demand for the book to warrant its publication. It is likely that the work would be issued in a set of three volumes, and the expense involved could hardly be less than ten or twelve dollars per set, even with an edition of considerable size.

In order to assist in estimating the probable demand for such a work, those who would be interested in the purchase of this set of books are asked to write to Walter R. Reed, Secretary General, 1733 Sixteenth Street N. W., Washington, D. C., and so advise him.

[Albert Pike (1809-1891) was a relative of the Gen. Zebulon Pike for whom Pike's Peak is named. The AMERICAN BAR ASSOCIATION JOURNAL in its issue of April, 1927, published an eight-page article by Hon. Charles S. Lobingier on General Pike as a master of the science of Comparative Law. In this article Pike was characterized as more profound even than Story and Kent, in the Civil Law, and the thought was expressed that "the time has come to recognize and reclaim Pike as a comparative lawyer." The table of contents of Pike's unpublished manuscript, referred to above, was printed in the JOURNAL on pages 209-10, and Judge Lobingier said of it:

"It is on this framework that Pike hangs his material, consisting of excerpts and quotations from the writings of the great authorities both ancient and modern. It is a rare and unique collection of the garnered legal lore of many centuries and it reflects little credit on the legal profession that this work has been allowed so long to remain in oblivion."]

# News of the Bar Associations

## Ohio State Bar Association Holds Annual Meeting— Debate on Integrating the Bar—Double Referendum Favored—Probate Law Revision—1206 New Members in Sight—Reports and Addresses—Distinguished Speak- ers at Banquet

THE annual meeting of the Ohio State Bar Association brought a record attendance of 1033 members to the Hotel Statler in Cleveland, on Oct. 19, 20 and 21. One of the chief attractions was the fact that a proposal to integrate the bar of Ohio was scheduled to be presented to the meeting with a recommendation that definite action be taken.

### *Proposed Integration of the Bar: Referendum Will Be Held*

The plan of integration prepared by the State Bar Committee on Integration, headed by former President Walter S. Ruff of Canton, is based upon a rule of the Supreme Court instead of action by the legislature, under the theory that the highest court of the state has inherent power to regulate and control the state bar by promulgation of a rule.

A tentative draft of the rule was presented to the spring Association meeting in Columbus on April 14, 1939, and at that time it was decided to hold a series of regional meetings throughout the state during the following six months for the purpose of discussing the rule with the members and obtaining their reactions and suggestions. Accordingly, four regional meetings covering all of the counties in the state and three local meetings covering metropolitan areas were held, and as a result the rule was revised for presentation to the October meeting.

The report of the integration committee, containing the motion that the executive committee be authorized to submit the rule to a referendum vote of all of the members of the Association, and that if it is there approved the Association submit it to the Supreme Court with the request that it be adopted, was approved after a lengthy and comprehensive debate. A motion was also passed that the court be requested to submit the rule to a referendum of all the known practicing lawyers of the state.

The newly created committee on the facilities of the law library of Congress presented its first report to the Association, which voted to adopt the following resolution contained in the report: "RESOLVED that the Ohio State Bar



GERRITT J. FREDRIKS  
President, Ohio State Bar Association

Association recommends to the Congress the adoption of generous appropriations for the support and development of the Law Library of Congress to the end that it may properly fulfill the function of the national principal repository of legal literature and original source material."

### *Probate Law Revision*

The probate law committee, which originally drafted the revised code adopted in 1931, presented for consideration of the Association a series of proposed revisions of the code, embracing investments by fiduciaries in notes and bonds secured by first mortgage on real estate, and in certain utility and railroad first mortgage bonds; necessary parties in a guardian's land sale proceedings; manner of service upon minors of notices issuable from the probate court; distribution of funds of a non-resident ward; payment by employer of wages not exceeding \$150 without administration; determination of the com-

missions to which an executor or administrator is entitled; effect of an election to take under the will in case of partial intestacy; and provisions relating to the proceedings for the settlement of the accounts of testamentary trustees. The report of the committee requested that no action be taken on the proposals at present, but that they be discussed with members of the Association preparatory to possible final recommendations by the committee at a later date.

The committee on uniform state laws reported that the Association had secured the adoption by the last session of the Legislature of the four uniform evidence acts and that it is the intention of the committee to continue its endeavors to secure the adoption of the uniform conditional sales act and the uniform trust receipts act.

Gerritt J. Fredriks of Cincinnati, who had served as a member of the executive committee and lately as senior vice-president of the Association, was elected to the presidency for the coming year, succeeding Howard L. Barkdull of Cleveland.

### *1206 New Members*

One of the outstanding accomplishments of President Barkdull's administration lay in the field of membership. At the beginning of the last Association year, the membership committee, under the chairmanship of Earl R. Hoover of Cleveland, announced that it intended to secure the unheard-of number of one thousand new members during the year. An intensive state-wide campaign was instituted with quotas for each locality. As a result, the committee was able to report to the meeting that, not one thousand, but twelve hundred and six applications for membership had been secured.

Those attending the Ohio State Bar Association October meeting had the privilege of hearing addresses by an imposing list of speakers. The judicial section presented discussions of trial and appellate procedural problems by former Ohio Supreme Court Judge Robert N. Gorman of Cincinnati and Richard F. Stevens of Elyria. Members of the insurance law section heard Professor Edwin W. Patterson of Columbia, one of the nation's outstanding authorities on insurance law, speak on the standard automobile liability insurance policy. Charles C. White, chief title officer of Cleveland's Land Title Guarantee & Trust Co., presented recent devel-

opments in the Ohio Law of real property to the real estate section. The members of the junior bar section secured as their guest speaker Luther Day of Cleveland, one of Ohio's foremost trial lawyers, who addressed them on "Present Day Trial and Procedure."

Immediately prior to the presentation of the report of the integration committee, Hon. Carl R. Henry of Alpena, Michigan, former president of the State Bar of Michigan, spoke to the general association meeting on the results of four years of integration in Michigan. During the afternoon business session, United States Senator Robert A. Taft gave a highly interesting and timely address on "Emergency Powers of the President." Senator Taft, one of the leading contenders for the Republican presidential nomination in 1940, drew more than a

capacity crowd to the large ballroom of the hotel.

#### *Annual Dinner*

The annual banquet at the close of the meeting also had its share of prominent speakers. U. S. Circuit Court of Appeals Judge John J. Parker of Charlotte, North Carolina, delivered an address on "Constitutionalism in Our Changing World," and Professor Edmund M. Morgan of Harvard Law School gave a highly amusing discourse on "That Glorious Mystery—The Law of Evidence."

Upon being inducted into office at the conclusion of the banquet, President Fredriks earnestly solicited the fine type of cooperation during the coming year which has characterized the last and previous years.

J. ROBERT SWARTZ,  
Assistant Secretary.

### ***Missouri Bar Association—500 Members Come to Annual Meeting—Legislative Program a Partial Success—Bar Will Fight On—New Method of Judicial Selection in Front Rank of Bar's Objectives—Many Topics of Professional Interest Discussed***

OVER five hundred lawyers attended the fifty-ninth annual meeting of the Missouri Bar Association, at St. Joseph, on Sept. 29 and 30.

President Inghram D. Hook, in his annual message, reviewed the activities of the Association during the year, calling attention to noteworthy matters which came before the legislature at the last session of great interest to the Association and to the bar, referring especially to the Kansas City police bill and the reorganization of the Lincoln university for colored people which was made necessary by the decision of the Supreme Court of the United States in the Gaines case. He called attention to the fact that the bill sponsored by the Association's committee on statutory revision and legislative drafting and research which had received favorable consideration by various public agencies and newspapers throughout the State was defeated, but a bill was passed establishing a reference library and reference service; also to the fact that the bill, jointly sponsored by the Missouri Institution for the Administration of Justice and the Association's committee, giving the Missouri supreme court rule-making power, met with defeat, but the legislature recommended that the supreme court study the situation and report to the next legislature, so that all hope for the bill was not as yet lost.

Mr. Hook stated that an outstanding achievement of the Association during

the year was the enactment of a small loans bill which was sponsored by an Association committee composed of younger members of the bar, who were actively assisted by numerous junior members.

A committee reported on the progress of the Association's proposed constitutional amendment for a new method of selection and tenure of the judiciary, and recommended that it be submitted to the voters of the State of Missouri directly through the initiative at the next general election of 1940.

Rodney M. Fairfield delivered an interesting report for the committee on public relations, urging that a public relations counsel be employed to carry on a comprehensive program of educating the public with respect to the functions and work of the Missouri Bar Association.

Interesting and informative addresses were delivered by Dean William F. Clarke of the De Paul University College of Law, Chicago, who spoke on "The Folly of Bigotry"; Judge Floyd E. Thompson, also of Chicago, on "The American Way"; and Will Shafroth, Adviser to the American Bar Association Section on Legal Education and Admission to the Bar, who spoke on "The Ultimate Objective in Raising the Standards of Legal Education."

On Friday evening a complimentary stag dinner was given visiting mem-



ROSCOE ANDERSON  
President, Missouri Bar Association

bers of the Association by the St. Joseph Bar Association. At the same time a dinner was held for the women members by the Women's Bar Association of Missouri.

The Association adopted a report suggesting various changes in the probate laws, among which were the requirement that probate judges be required to be licensed lawyers and that legislation be enacted to require executors acting without bond to give bond during appeal from an order of the probate court removing such executor. The Association also went on record unanimously approving the report of the committee on amendments, judiciary and procedure, urging the continuance of strong support for the proposed State constitutional amendment for the appointment of judges by the governor from a list submitted by a non-partisan and non-political commission. The Association also approved the report of the committee on defense of civil rights, decrying the continued movement of hearing more and more proceedings of a judicial nature by boards, bureaus, commissions, and trial examiners, stating that this movement is gradually taking away from the people a government by law, and substituting therefor a government of men.

Roscoe Anderson was elected President, James A. Potter of Jefferson City, Secretary, and Judge Paul Buzard, Treasurer, for the ensuing year.

## A CHRISTMAS LETTER



DRESSED in my green cloth suit and gold necktie, I've had the privilege of sitting in at thousands of conferences in lawyers' and judges' offices and chambers during 1939.

When in doubt on any fine points of the law my associates have turned to me for my opinions. In my answers, I've been *impartial*, and I've been complimented on my clear language which made it easy for those asking my advice to understand my explanations and cautions.

Very often worried looks have changed as the light of understanding illuminated the minds of my listeners. I've made my points by means of illustrations selected to be helpful in clearing up confusion. When questioned as to my authority on the thousands of narrow points discussed, I've referred my listeners to the great cases from which I took my language.

I've made many new friends in 1939 and renewed acquaintances with thousands of older associates. May I wish them all a glorious Christmas and a prosperous New Year! May they ever remember that I am their respectful servant!

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**State Bar of Michigan Has Fourth Annual Meeting—Registration of 1,365 Breaks Record—New Probate Code—Cooperation with Legislature—Committee Reports Show Marked Activity in Wide Fields—"Legal Service Bureaus" Proposed and Attacked**

THE State Bar of Michigan held its fourth annual meeting at the Hotel Statler in Detroit on Sept. 21 and 22, with a record-breaking attendance of 1,365 actual registrants. The convention opened Thursday morning with the annual business meeting, which was addressed by President Carl R. Henry of Alpena, who summarized the activities of the State Bar during the past year. President Henry told of the successful cooperation between State bar committees and the State legislature and stressed particularly the methods employed in connection with the re-drafting and passage of the new probate code. The vice-president, Julius H. Amberg, was designated as counsel for the State Bar to cooperate with the various committees of the legislature dealing with this code. He served without compensation, and was assisted by a drafting committee of younger lawyers, some of whom received compensation from the State Bar. Hundreds of amendments were suggested to the legislature, and adopted. The result was not only a vastly improved probate code, but a newly created spirit of cooperation between the State legislature and the bar.

**Law Office Study—Admission to Bar**

Committee reports which had been printed in advance of the meeting in the State Bar Journal were discussed. Of particular interest were the recommendations of the committee on legal education and admission to the bar, which were adopted at the meeting. The committee recommended further efforts by the State Bar to abolish the study of law under preceptors, which is now permitted by statute. The committee was of the opinion that a period of training in a law office should be made one of the requirements of the practice of law in Michigan, but recommended further study of the subject. The committee further urged the necessity for character and background investigations for applicants to the bar. The committee also reported that its survey of lawyers who have been in practice for five years or less was nearing conclusion.

**The Association's Legislative Record**

The committee on criminal jurisprudence reported considerable activity in connection with the last session of



JULIUS H. AMBERG  
President, State Bar of Michigan

the legislature. The following excerpts from the report of this committee should be of interest:

"No bills or proposals of which the committee disapproved became law. Of the seventeen approved thirteen became law and four did not. The four disapproved by the committee failed of enactment.

"From this it appears that the legislature was rather responsive to the opinions of those representing the State Bar of Michigan and other organizations interested in improved law enforcement and public protection, who were designated to give their special attention, in behalf of said organizations, to this particular field of the law.

"Our greatest regret arises from the failure of the legislature to give to the people an equal right with the respondent to appeal to the supreme court in the event of error on the part of the trial court. Such right exists now in several of our States and the results have been satisfactory. It is hoped that efforts in this direction may be continued to ultimate success."

A most interesting discussion took place regarding a proposed resolution requesting the Supreme Court of Michigan to adopt certain canons of judicial ethics drastically restricting the freedom of trial judges in their court-room conduct. After a lengthy discussion in which it was pointed out that the Supreme Court of Michigan had never adopted a code of judicial ethics, the proposed resolution was amended to read: "The State Bar of Michigan requests the Supreme Court to adopt a code of judicial ethics," and passed as amended.

**Economic Condition of the Bar**

A series of seven resolutions relating to the economic welfare of the bar was thoroughly discussed, the report of the American Bar Association special committee on the economic condition of the bar, published in June, 1938, being frequently referred to. The appointment of a committee was authorized to make a survey of the economic condition of the lawyers in Michigan and to report to the board of commissioners their findings and recommendations, and the members authorized the expenditure of approximately \$2,000.00 for the purpose.

After vehement opposition, a resolution authorizing a committee to do experimental work in connection with standardized neighborhood law offices and legal service bureaus was withdrawn. The matter of various schemes for cut-rate legal services and the possibilities of extending legal aid work throughout the State are receiving the studied attention of the board of commissioners and various committees of the State Bar.

After a brief discussion, a resolution was adopted directing the legislative committee of the State Bar to undertake a revision of the workmen's compensation act.

During a discussion on civil liberties, the members were informed that on February 1, 1939, the president was directed to appoint a committee on civil liberties composed of the State delegates to the American Bar Association.

Space will not permit the recital of further details of this year's business meeting. In summary, let me say that it was one of the most interesting and thought-provoking Bar Association meetings ever held in these parts.

**Supreme Court Luncheon and Annual Dinner**

Thursday night there was a most enjoyable dinner dance which was well attended by lawyers and their wives. On Friday, the sessions were attended by unprecedented crowds. In the morning three members of the bar, including

the chairman of the senate and the chairman of the house judiciary committees, reviewed the legislation passed by the State legislature in 1939. Friday noon the usual luncheon in honor of the judges of the Supreme Court of Michigan was held. The available facilities of the hotel were over-taxed and hundreds of lawyers could not attend the luncheon. George J. Burke of Ann Arbor presided as toastmaster and introduced Chief Justice Henry M. Butzel, who discussed the work of the Court. Honorable Roscoe Pound, former Dean of the Harvard Law School, addressed the members on the subject, "The American Judiciary." Friday afternoon another over-flow crowd participated in an interesting and instructive legal institute on the subject of the new probate code. A sort of "Information, Please" discussion concluded the afternoon.

The annual banquet was held Friday evening. Frank D. Eaman acted as toastmaster. The gold attendance trophy, presented in 1938 by the Grand Rapids Bar Association, was again awarded to the Suburban Bar Association of Wayne County for one hundred per cent. attendance at the convention. Hon. George Maurice Morris of Washington, D. C., spoke on "Nothing But The Record."

#### *Entertainment: Business*

Special features of entertainment were arranged by the entertainment committee for the pleasure of the ladies attending the convention. Friday morning special buses conveyed the ladies to Ford's Greenfield Village, at Dearborn, for a tour of the village. During the tour the ladies were entertained in the Lovett ballroom at Edison Institute with old time dances by the Greenfield Village school children, with music furnished by the Ford Old Time Orchestra under the supervision of director Lovett. Luncheon was served at Dearborn Inn, and the afternoon was spent visiting the beautiful gardens of Mrs. Henry Ford.

At the annual meeting of the board of commissioners held on November 4th, the following officers were elected: Julius H. Amberg, president; Glenn C. Gillespie, first vice-president; Fred G. Dewey, second vice-president; Leo I. Franklin, secretary; Dean W. Kelley, treasurer; Henry L. Woolfenden, Jr., executive secretary.

An active program for the coming year is being prepared.

LEO I. FRANKLIN,  
*Secretary.*



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## Connecticut—Annual Convention of State Bar—Interest in Pre-Trial Procedure—Rules of Court and Probate Law Modernization—State and Local Associations Working Together—Duty of Bar to Provide Efficient Public Service Recognized



FREDERICK H. WIGGINS  
President, State Bar Association of  
Connecticut

THE State Bar Association of Connecticut held its annual convention at New Haven on October 23 and 24, 1939. The two-day meeting attracted between two and three hundred lawyers of the State. The Superior Court suspended business on the second day in order to permit this. Many subjects were discussed which were of interest to the lawyers and to the public, and which might tend to improve the law and administration of the law. Among such subjects were discussions of the efforts which have been going on for a considerable time to change our probate system which is imbedded in our constitution, requiring considerable education of the people, especially in the smaller communities, in order to obtain a more modern system of procedure. There were two reports from experienced trial judges, one a federal judge from Massachusetts, concerning the new practice of pre-trial procedure, with reports upon the large amount of court business which has been and can be disposed of by common-sense methods of conference outside the courtroom. There were reports and discussions of modernization of systems of survey and maps in land records, and reports of work done to make uniform the practice of title-searchers, which though primarily of professional interest would promote the interests of buyers and sell-

ers of land. In the criminal law section there were independent papers and discussions of parole of prisoners, certainly a subject of great interest to society generally, and there were papers and discussions upon ways and means for preventing the public from being imposed upon by persons attempting to give legal services without qualification to do so. There was also a report on the new rules of practice designed to modernize and expedite business in the federal courts, and comparison of these rules with our rules in Connecticut. Attention is called to the fact that our procedure may not be so bad, since many of the federal rules are taken directly from our own practice.

### Reorganization of the Bar

The following paragraphs are from the report of Frederick H. Wiggins, of New Haven, president of the Connecticut Bar Association:

"The meeting was concluded by a banquet on the evening of the second day, at which President Beardsley of the American Bar Association was the principal speaker.

"Until a few years ago, the Connecticut State Bar Association was a rather loosely knit organization. Its activities were a formal afternoon and evening meeting in the winter, and an annual meeting held in midsummer, which was more in the nature of a game of golf for lawyers than an effort to organize the Bar for public service. Two years ago, however, chiefly under the leadership of Warren F. Cressy of Stamford, the Association undertook to reorganize both its structure and its policies. Great strides have been taken in making the Association, together with its affiliated county and city bar associations, an increasingly important factor in the administration of law throughout the State. The State association now boasts of nearly five hundred members drawn from the representative lawyers of every city and town in the State, and the membership is growing.

### Pre-Trial Procedure

"Judge Quinlan's address on 'Pre-Trial Procedure' merits special attention because of the novelty of this common-sense procedure and the beneficial results which would flow from it if it were adopted in this State. Pre-trial procedure is a practice which, briefly, requires an informal conference in the

office ('chambers' in legal parlance) of a judge (preferably *not* the judge who later tries the case) between the judge and the attorneys for all litigants in the case. The whole case is frankly discussed and as many as possible of the facts and applicable rules of law are agreed upon. This obviously results in narrowing the issues to the few facts or rules of law which are genuinely disputed. A memorandum is then prepared by the judge which sets forth concisely the nature of the case and what is agreed upon and what is disputed. Thus, when the case comes to trial, it has been stripped of all nonessentials and surprises and a great simplification and saving in time results.

"Pre-trial procedure has been successfully employed in several other states and in the federal courts. Judge Sweeny of the federal court in Boston came from Massachusetts to tell how its use has speeded up the accomplishment of court business there. In a large percentage of cases this procedure results in the litigants arriving at a voluntary settlement as soon as all the cards are face up on the table. It has lately been used with success in the Superior Court in Hartford. If it lives up to advance reports, its formal adoption throughout the State would result in a large saving in the time and expense of litigation, thereby constituting a substantial benefit to the public.

"Judge Miller, of Bridgeport, discussed the extent to which the public interest is endangered by notaries public, real estate agents, banks and others who sometimes undertake to give legal advice or to prepare legal documents such as wills, deeds, leases, etc. Unfortunately, these pseudo-lawyers frequently make a botch of their 'clients' affairs. Thus, although the bar does not wish to impose its services (and fees) upon the public unnecessarily, it is a grave question whether any satisfactory line of demarcation can be drawn which is short of an absolute prohibition upon legal work by laymen and lay agencies.

### Keeping Legal Methods Up to Date

"Probably the most significant aspect of the whole two-day convention was the very evident awareness on the part of the bar of the great need for simplification and modernization of legal methods and procedure, both in and out of court, in order adequately to render efficient and convenient public service. This was the underlying theme at the several section meetings on the first day and it was again the dominant note during the general meetings on the second day. Finally, it was the point which Mr. Beardsley chiefly emphasized in his address at the closing banquet."

## Virginia State Bar Association Passes Half-Century Mark—Annual Meeting—Addresses—Social Events—Officers Elected

THE fiftieth annual meeting of The Virginia State Bar Association was held at the Chamberlin Hotel, Old Point Comfort, Virginia, August 3, 4 and 5, 1939. This meeting marked the conclusion of another successful year for the Association, under the leadership of Lewis C. Williams, of Richmond, Virginia, as its President.

The reports of the officers and the various committees were uniformly good and demonstrated that the Association had been active throughout the year in promoting its objectives.

The President's address was a scholarly and informative paper on "Administrative Law and Liberty," delivered at the Thursday evening session.

On Friday morning Mr. J. Gordon Bohannon, of Petersburg, member of the American Bar Association Committee on Reform in State Procedure, read an excellent and timely paper on "Pre-Trial Procedure." This paper was well received and resulted in the appointment of a Committee for co-

operation with the Committee from the American Bar Association, to bring to the attention of the profession the improvements in State Procedure suggested by the American Bar Association Committee.

The annual address was delivered by Mr. Forney Johnston, of Birmingham, Alabama, on the subject, "Results of the Supreme Court's Reversal of Constitutional Theory." This was a brilliant address delivered in an attractive manner.

Friday evening Colonel O. R. McGuire, of Arlington, Virginia, delivered an address on "The Republican Form of Government and the Straw Ballot—An Examination," which reflected the usual careful study and accurate information of Colonel McGuire.

Saturday morning Major Robert T. Barton, Jr., of Richmond, gave an interesting account of the work of the Commissioners on Uniformity of State Laws. This was followed by the re-



ROBERT O. NORRIS  
President, Virginia State Bar Association

*the New*

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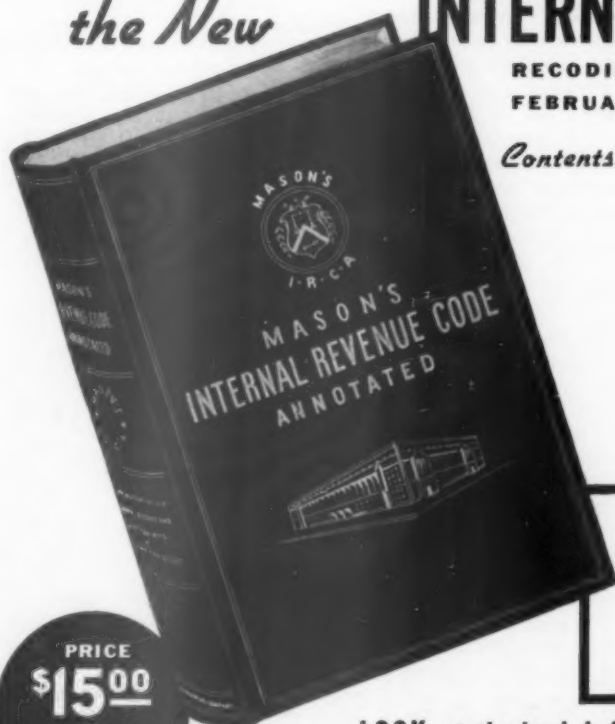
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Louis Goldstein,  
Secretary,  
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New York City.

ports of officers, the reports of committees and the election of officers.

Officers elected for the ensuing year were President, Honorable Robert O. Norris, Jr., of Lively; Secretary-Treasurer, Cassius M. Chichester, of Richmond; Vice-Presidents, James R. Caskie, of Lynchburg, George D. Conrad, of Harrisonburg, M. Melville Long, of St. Paul, Charles E. Ford, of Newport News, and Kennon C. Whittle, Martinsville.

The annual dinner was held on the evening of August 5th. Prizes for golf, tennis and bridge were presented by Mr. Stuart G. Christian, Chairman of the Tournaments Committee. Honorable James H. Price, Governor of Virginia, was then presented by the President and made a few remarks in a happy vein. He was followed by Mr. William G. Stathers, President of the West Virginia Bar Association, who brought friendly greetings from the Bar Association of that State. The main address of the evening was delivered by the Honorable Mr. Justice Henry Hague Davis, of the Supreme Court of Canada. Mr. Justice Davis charmed his audience. The conclusion of the dinner was an address in lighter vein, delivered by Honorable Holman Willis, of Roanoke, in his inimitable style.

The meeting adjourned with the presentation of the incoming President.

STUART B. CAMPBELL,  
Chairman of Committee for Cooperation with American Bar Association.

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## The "Grandfather Clause" in Bar Admissions in Maryland

THE Baltimore Sun of November 1, 1939, has a remarkable story about the effect of a law passed at the last session of the Maryland legislature raising the requirements for admission to the bar, in accordance with the recommendation of the Baltimore Bar Association, from a high school education to one year of college work beginning June 1, 1940, and two years of college work after June 1, 1941. In order to get this bill through the legislature the bar association had to consent to an amendment which allows anyone who lived in Maryland in 1918 and is now over forty years of age to begin the study of law without even a high school education. November 1 was the last day for taking advantage of this "grandfather clause." Up to the previous evening several hundred persons had filed petitions with the Court of Appeals to take advantage of the exception. This list included a representative in Congress, a district political leader, the president of the city council of Baltimore, two state senators (one of them the author of the amendment), a state legislator, and a large number of city and state employees.

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## Cleveland Bar Makes Clean Sweep in Judicial Election

THE vigorous and public spirited campaign of the Cleveland Bar Association brought it a one hundred per cent victory in the Municipal Court election on Nov. 7. Six candidates were endorsed in a referendum in which 1600 lawyers voted, and every candidate endorsed was elected. The following vote was cast for the six year terms:

### CHIEF JUSTICE

\*Burt W. Griffin.....135,701  
A. R. McNamara..... 53,528

### JANUARY 1 TERM

\*John J. Busher.....102,977  
Joseph N. Ackerman.....100,111

### JANUARY 2 TERM

\*Bradley Hull .....126,901  
Frank W. Sotak..... 62,972

### JANUARY 3 TERM

\*William J. McDermott..... 62,557  
Andrew M. Kovachy..... 44,282  
John L. Mihelich..... 25,145  
Alice F. Kelly..... 22,219  
John J. Mahon..... 21,002  
Anthony A. Fieger..... 18,695  
Frank J. Azzarello..... 13,730

### JANUARY 4 TERM

\*Louis Petrash (unopposed) ..145,698

### JANUARY 5 TERM

\*Lewis Drucker ..... 92,515  
Don C. Miller..... 51,265  
Michael P. O'Brien..... 58,528  
J. Rogers Jewitt..... 11,182

\*Endorsed by Cleveland Bar Association.

The Cleveland Press, Plain Dealer, News, the Citizens League and the Federation of Women's Clubs of Greater Cleveland were so impressed with the choices of the bar that all recommended the bar's candidates.

During the period from 1922 to 1939 inclusive, the Association has recommended 140 candidates; of these, 110 have been elected. The victory of Nov. 7, 1939, is the eighth perfect score for the Association.

Ben C. Boer served as chairman of the campaign committee this year, J. Virgil Cory as vice chairman, and Harry F. Pattie as manager.

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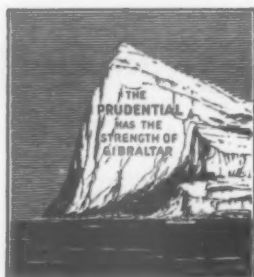
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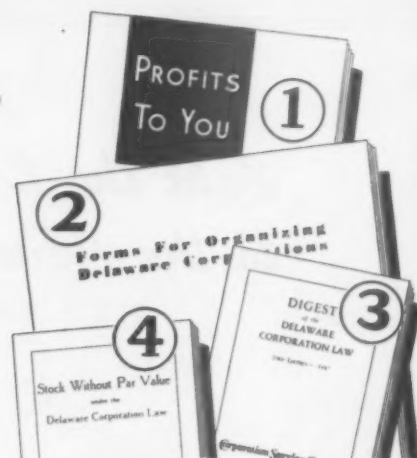
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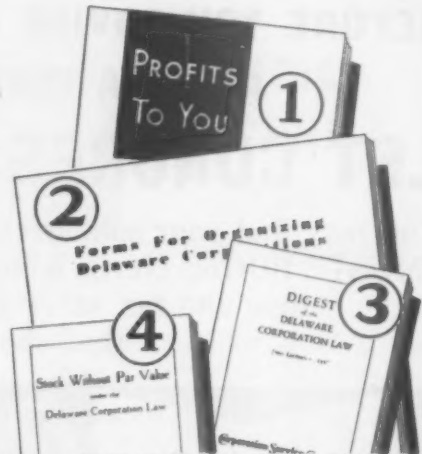
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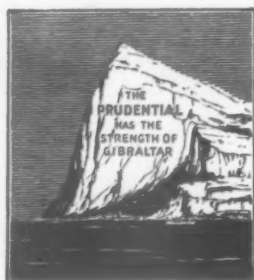
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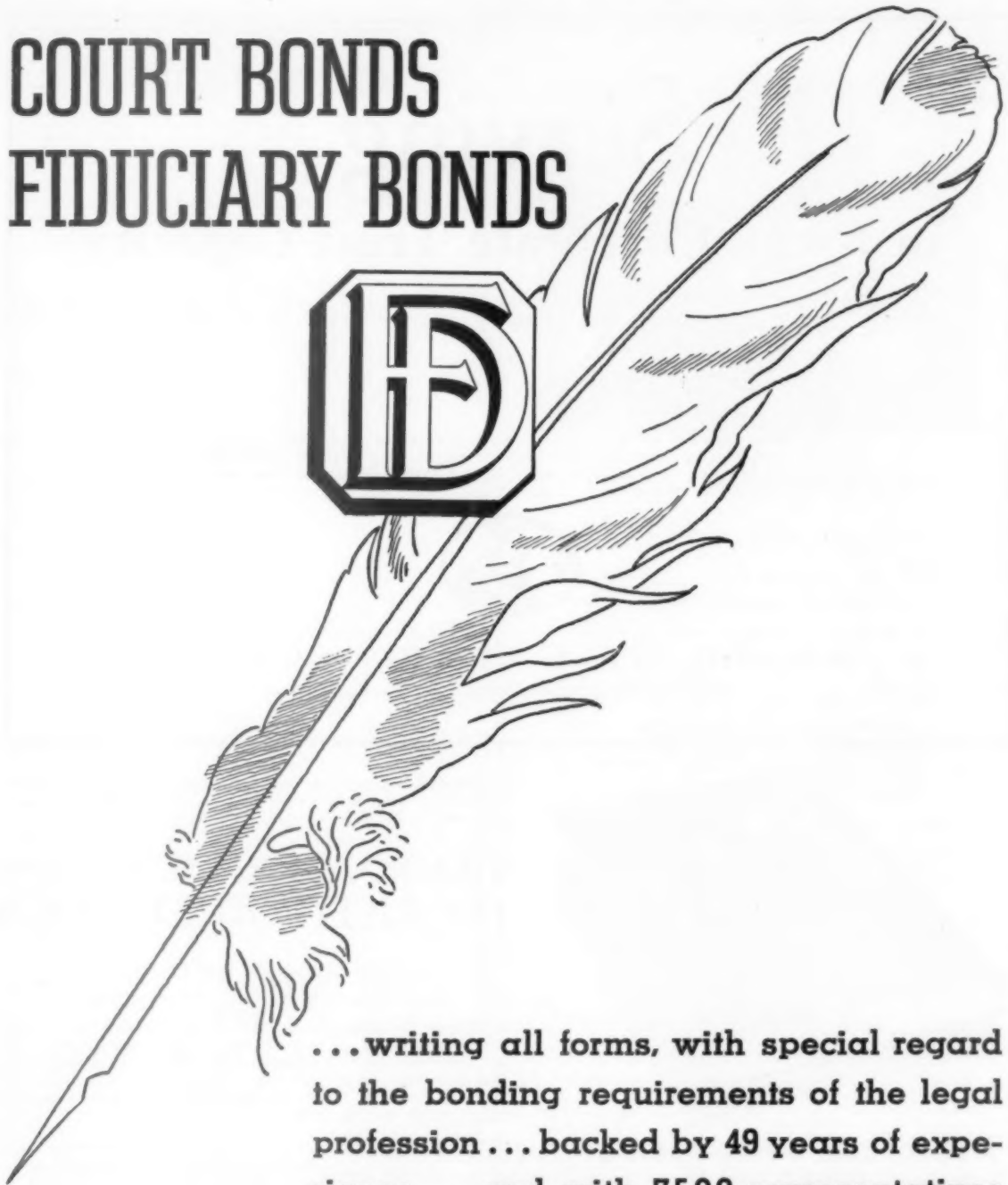
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*Raymond Newman*  
President

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Foreword by Judge Arthur C. Denison

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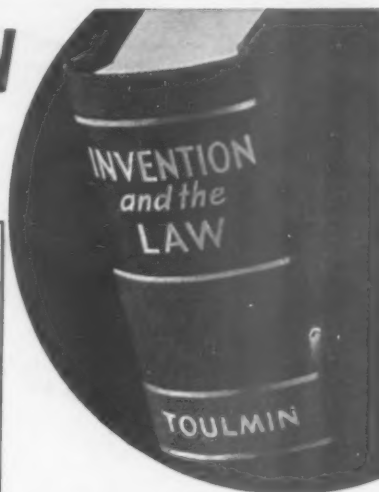
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v. Republic National Bank & Trust Company, 114  
S. W. 2nd, P. 1223, the court said:

"TURNING AGAIN TO 2 C.J.S., Agency, sec. 112,  
supra, we find that, 'An agent's authority as to  
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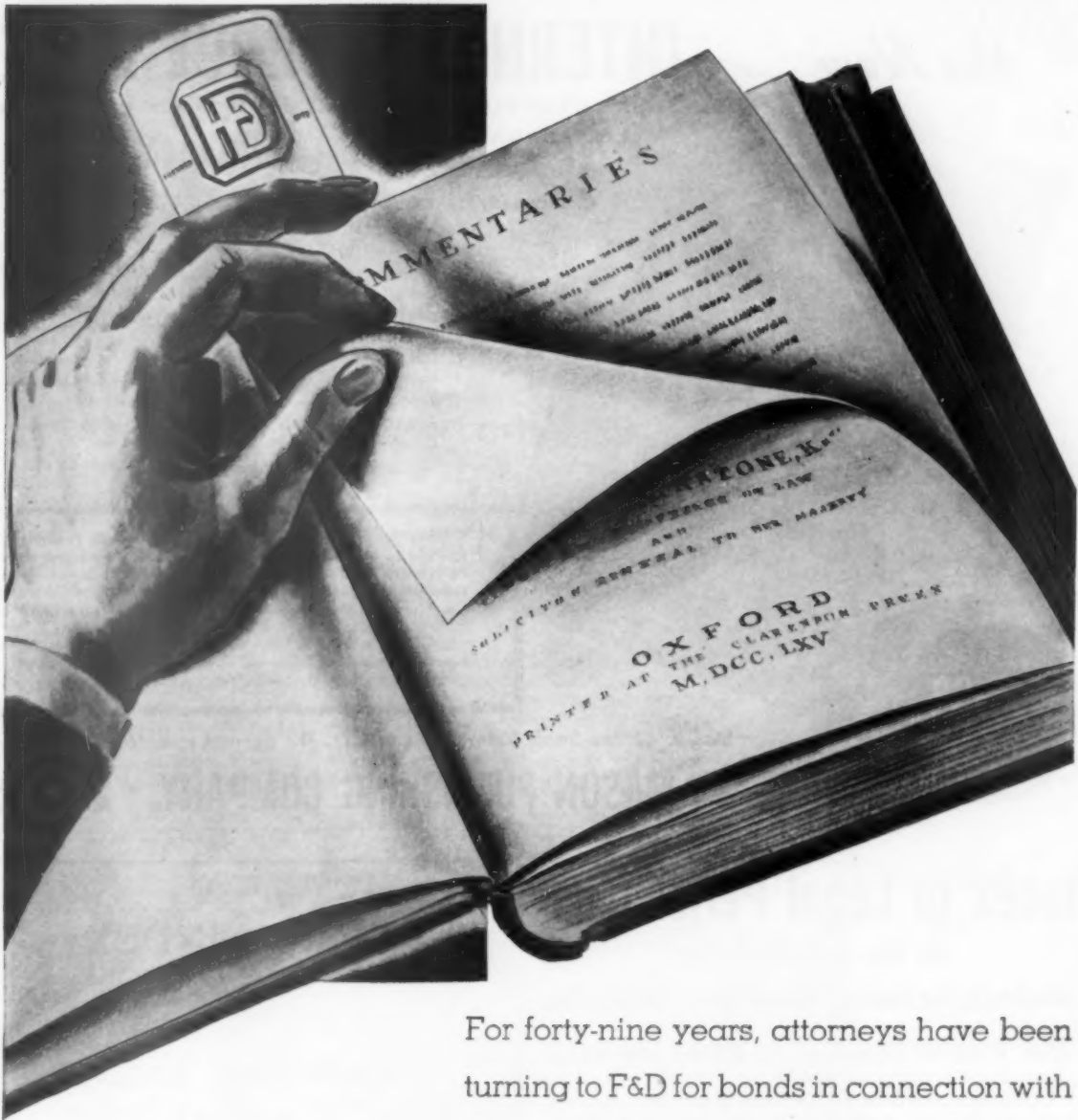
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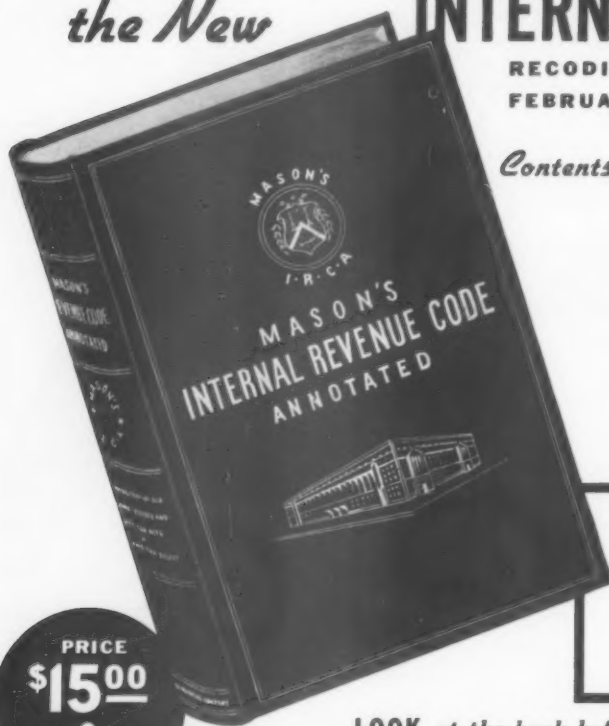
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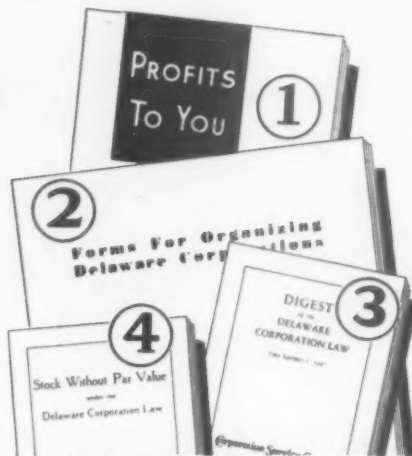
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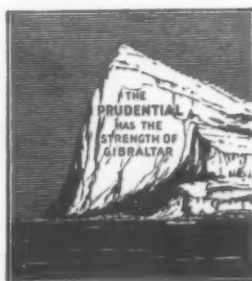
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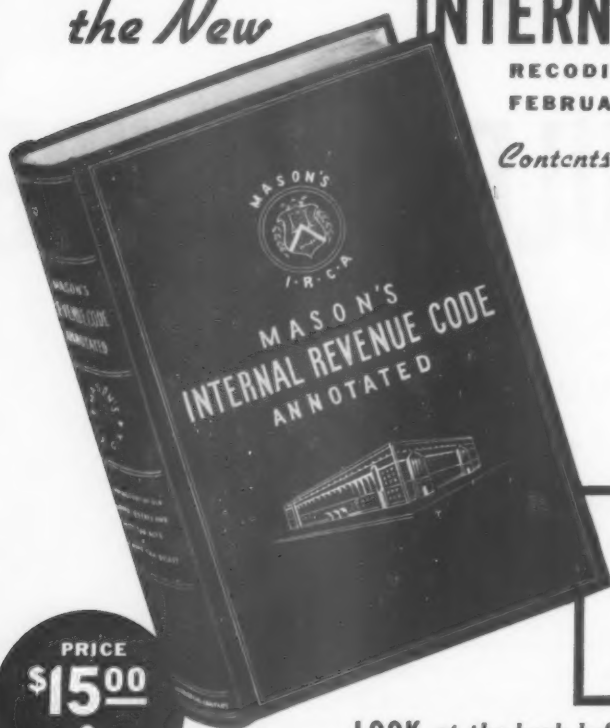
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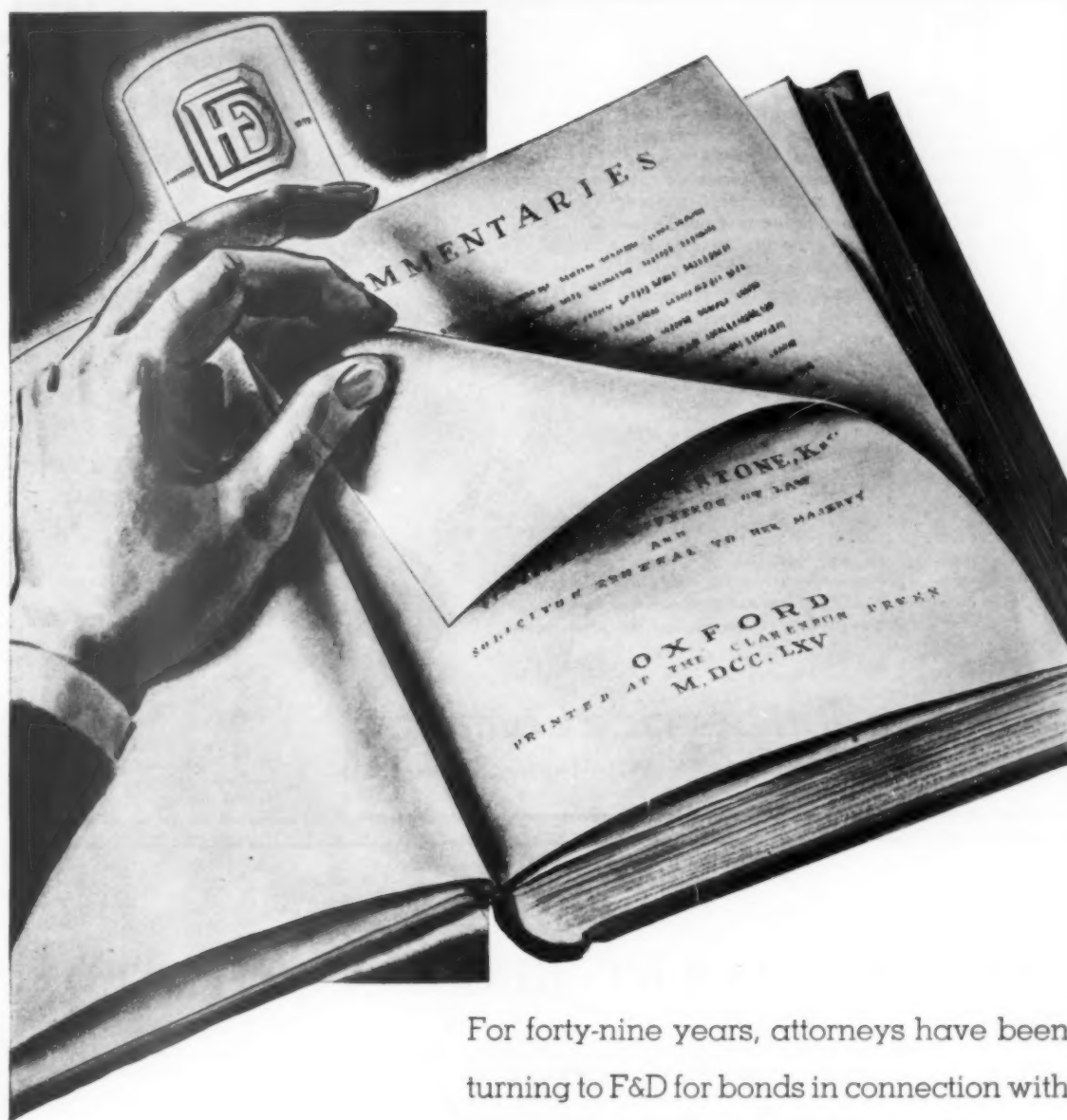
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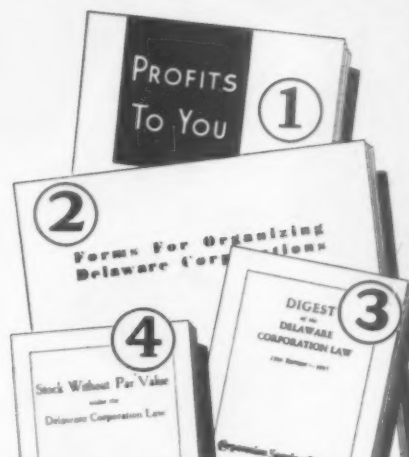
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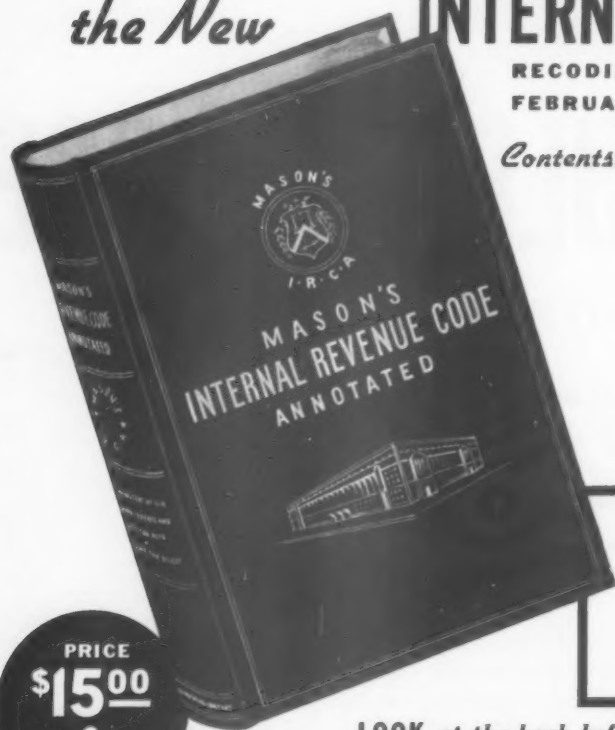
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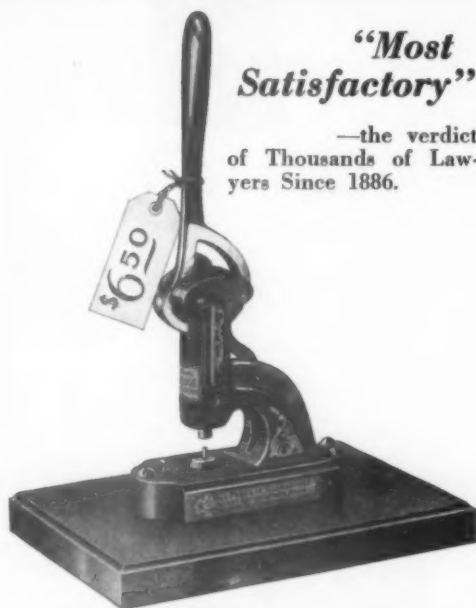
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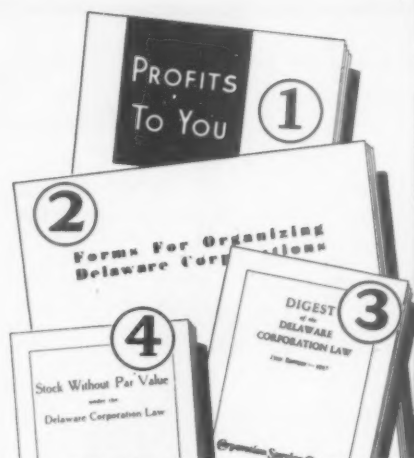
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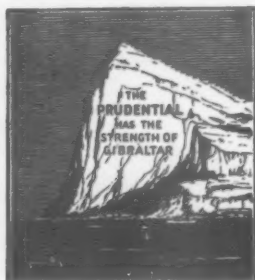
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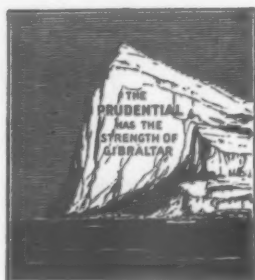
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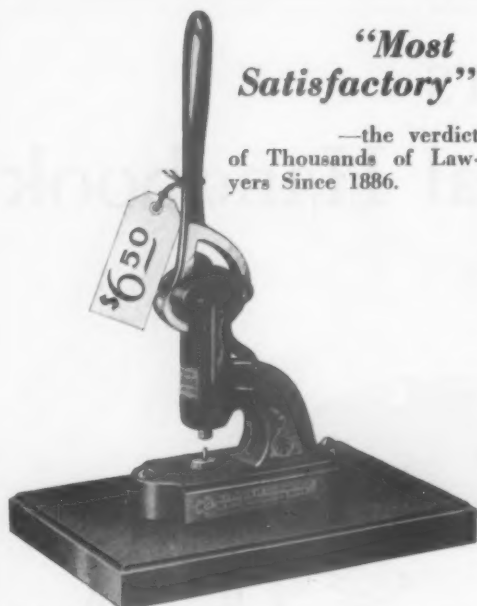
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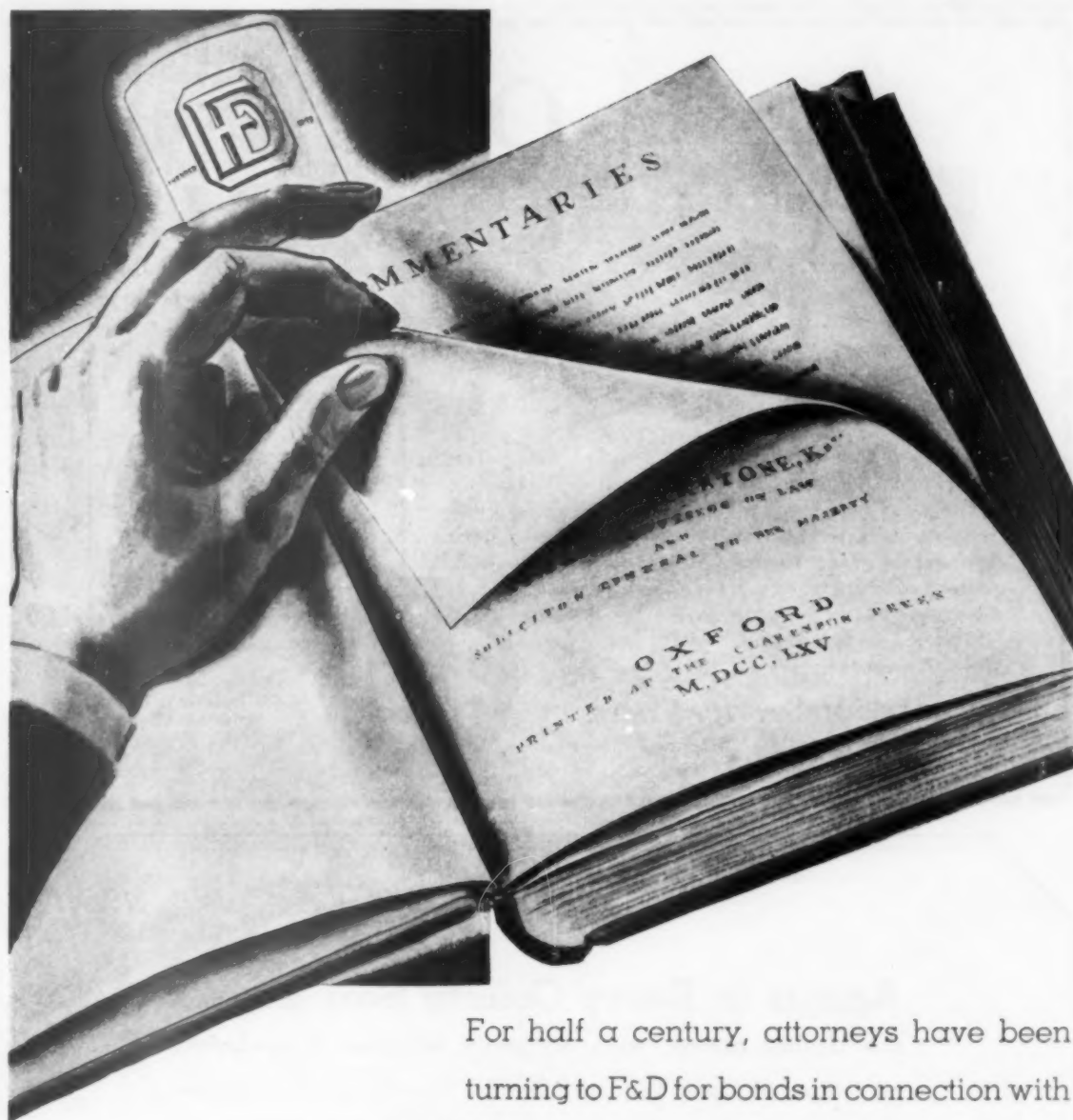
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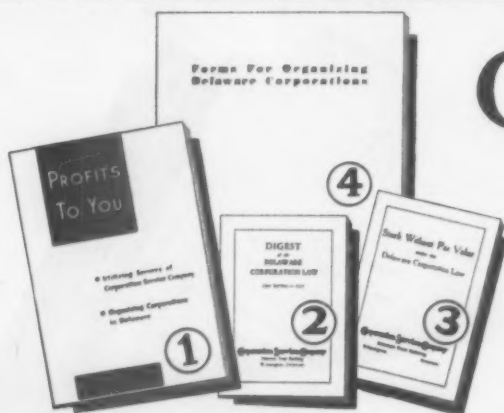
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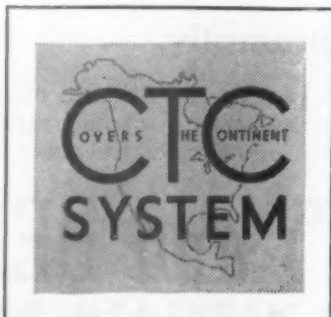
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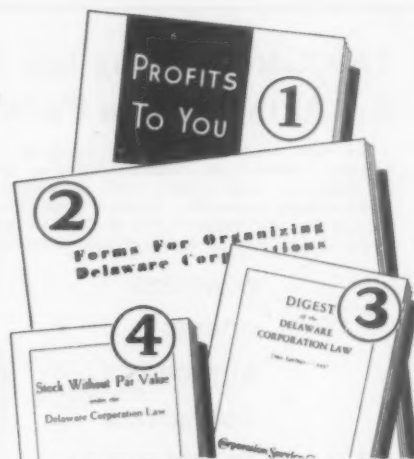
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